

PUBLIC CONTRACTS REVIEW BOARD

Case 1169 – CFT 009-6079/2017 – Tender for the Repairs of RC Internal Wall including Application of Appropriate High Tech Paint to exposed surfaces in the Grey Water Reservoir to High Energy efficiency standards using Environmentally Friendly Construction Materials and Products at Mater Dei Hospital

The publication date of the call for tenders was the 12th December 2017 whilst the closing date of the call for tenders was the 15th January 2018. The estimated value of the tender (exclusive of VAT) was € 125,000.

There was one (1) bidder on this tender.

Xn-teq Company Ltd filed an appeal on 12th April 2018 against the Contracting Authority's decision to cancel the tender. A deposit of € 625 was paid.

On 22nd May 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 – Xn-teq Company Ltd

Dr Michael Grech	Legal Representative
Dr Mario Calleja	Legal Representative
Mr Marco Camilleri	Representative

Contracting Authority – Central Procurement and Supplies Unit – Health

Dr Stefan Zrinzo Azzopardi	Legal Representative
Ing Frankie Caruana	Chairperson Evaluation Board
Ms Alison Gatt	Secretary Evaluation Board
Mr Joseph Muscat	Member Evaluation Board

The Chairman of the Public Contracts Review Board, Dr Anthony Cassar, invited Appellants to make their submission.

Dr Michael Grech, Legal Representative for Xn-teq Company Ltd sought permission to call a witness.

Ing Frankie Caruana (576063M) testified on oath that he was the Chairperson of the Evaluation Committee. He stated that the work covered by the tender was urgent and the estimated budget for this contract was € 125,000, with a threshold of € 135,000 (E-mail tabled confirming this although erroneously stating that the figure was € 138,000).

Dr Grech pointed out to the witness that according to article 46.4 of the tender conditions in the event of changes to the price terms after the submission of tenders, this could be reviewed. He further pointed out that under Legal Notice 26 of the 23rd January 2018 the threshold had been increased from € 135,000 to € 144,000 and therefore his clients' offer fell within this new threshold. Tenderer should have been contacted regarding this change.

Ing Caruana stated that the threshold was € 135,000 and the Contracting Authority had not contacted the bidder after the change in the legal notice. Bidder was only advised that the tender had been cancelled as his bid exceeded the budget figure. He confirmed that the Committee had been authorised to cancel the tender by the Department of Contracts. The bidder had not sought any clarification for the rejection of his bid. Witness again confirmed that the decision was based solely on the budget figure allocated.

Ms Alison Gatt (372782M) testified on oath that she was the tender co-ordinator and Secretary of the Evaluation Board and according to existing regulations the tender was automatically cancelled as it was in excess of the threshold. The Adjudication Board met on the 13th February 2018. She was aware that the threshold for departmental tenders had changed but the Board was bound by the threshold limit at the time of the tender.

Dr Michael Grech said that the change in the law meant that the bid qualified under the new limit. The bid exceeded budget but under Article 46 in the tender document a revision of the price was allowed. The Contracting Authority took no action following the change in the limit of the threshold which brought his clients' bid with those limits. The Authority should have accepted the offer and the tender should not have been cancelled.

Dr Stefan Zrinzo Azzopardi, Legal representative for the CPSU stated that the cancellation was solely due to the bid being over the budget. Procurement regulations allow this procedure if it is not economically viable to proceed with the tender – on this point alone the Evaluation Committee made the correct decision. A cardinal point in tenders was that the figure submitted

cannot be changed and Article 46.4 does not allow variations in the submitted tender. This offer was in excess of the departmental budget and it was correct to cancel it.

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

This Board,

Having noted this Objection filed by Xn-Teq Company Limited, (hereinafter referred to as the Appellants) on 12 April 2018 refers to the contentions made by the same Appellants with regards to the Cancellation of Tender of Reference CFT 009-6079/2017 listed as Case No 1169 in the records of the Public Contracts Review Board, issued by the Central Procurement and Supplies Unit.

Appearing for the Appellants: Dr Michael Grech

Appearing for the Contracting Authority: Dr Stefan Zrinzo Azzopardi

Whereby, the Appellants contend that:

- a) **Since there was a revision of the Threshold of this Tender and their offer was within the revised threshold, the Tender should not have been cancelled.**

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 30 April 2018 and its verbal submissions during the Public Hearing held on 22 May 2018, in that:

- a) **The Central Procurement and Supplies Unit insist that although there was a revision of threshold, the Appellants’ offer was still over the budget of € 125,000 and in this respect, the Contracting Authority had the necessary powers to cancel the Tender.**

This same Board also noted the testimony of the following witnesses, namely,

- 1. Ing Frankie Caruana duly summoned by Xn-Teq Company Limited;**
- 2. Ms Alison Gatt duly summoned by the Central Procurement and Supplies Unit.**

This Board, after having examined the relative documentation relating to this Appeal, and heard submissions made by the parties concerned, including the

testimony of the witnesses, opines that the issue worth of consideration is the reason as to why such a Tender was cancelled.

As per “*Letter of Rejection*” dated 10 April 2018, the Appellants were informed that the Tender has been cancelled as the submissions (offers) were over the Budget of € 125,000. At this particular stage of consideration, this Board acknowledges and upholds the fact that the Budget for this project was € 125,000 whilst XN-Teq Company Limited’s offer was € 142,588.36 representing an amount in excess of 15% of the estimated cost. At the time of the Evaluation Process, the amount for the threshold amount has been upgraded from € 135,000 to € 144,000. However, this Board notes that the Budget, (Estimated Costs), remained at € 125,000 so that the Appellants’ offer still remained well over the Budget. Yet again, this Board acknowledges that the Central Procurement and Supplies Unit has the right to cancel a Tender and one of the most common reasons is that an offer exceeds substantially the budgeted costs.

With regards to Xn-Teq Company Limited’s Contention that due to the fact that the threshold was increased to € 144,000, (through which the Appellants’ offer would have qualified), the Contracting Authority should have revised

their concept in order to consider the Appellants' offer within the threshold, this Board would respectfully point out that the Legal Notice through which an increase in threshold was issued applied to the threshold whereby a Tender can be classified as a Departmental Tender and in no particular way, to the estimated value of the Tender itself, so that whilst the threshold was increased for a Tender to be classified as a Departmental one, the Budget for the latter remained at € 125,000. In this regard, this Board cannot find any justification for the Appellants' contention. At the same instance, the Contracting Authority could not treat the Xn-Teq Company Limited's offer through a Negotiated Procedure.

Through the documentation made available to this Board, with special reference to the recommendation made by the Evaluation Board to the Department of Contracts, it was noted that the reasons given for the recommended decision read as follows:

“Due to a change in the exigencies of the Hospital, the Evaluation Committee has recommended that this Tender is cancelled and re-issued with updated specifications, cost and commitment of funds”

In this respect, this Board notes that such reasons given by the Evaluation Committee imply that there were changes in the parameters of the Tendered Works and therefore, this Board opines that such changes, (if any), should have been specified and even communicated to the Appellants in the Contracting Authority's "*Letter of Rejection*".

The majority of the submissions centred on the increase in threshold during the period of Evaluation Process and in this regard, this Board opines that such submissions were irrelevant, as the issues as to why the Tender was cancelled was due to:

- (i) A change in parameters;**

- (ii) The estimated cost did not cater for these changes.**

In view of the above, this Board,

- a) Upholds the Central Procurement and Supplies Unit's decision to cancel the Tender;**

b) Does not uphold the contentions made by Xn-Teq Company Limited;

c) Recommends that the deposit paid by the same Appellants is to be refunded.

Dr Anthony J Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

5th June 2018