

PUBLIC CONTRACTS REVIEW BOARD

Case 1213 – CT 3033/2017 – Supply Tender for the Acquisition, Installation, Commissioning and Testing of Equipment Partially using Energy Efficient Equipment – Core Infrastructure (Lot 2)

The publication date of the call for tenders was the 1st September 2017 whilst the closing date of the call for tenders was the 3rd October 2017. The estimated value of the tender (exclusive of VAT) was € 870,000

On the 20th August 2018, Computime Ltd filed an appeal against the Planning Authority as Contracting Authority due to their bid being rejected on the grounds that their offer was technically not compliant due to tenderers failure to clarify certain issues. A deposit of € 4,350 was paid.

There were three (3) bidders.

On 27th September 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 – Computime Ltd

Dr Steve Decesare	Legal Representative
Mr Andrew Borg	Representative
Mr Norman Cutajar	Representative
Mr Chris Ellul	Representative
Mr Steve Vella	Representative

Contracting Authority – Planning Authority

Mr Stephen Ferrito	Chairperson Evaluation Board
Mr Keith Cappello	Secretary Evaluation Board
Mr Alexander Attard	Member Evaluation Board
Mr Sven Farrugia	Member Evaluation Board
Mr Omar Hili	Member Evaluation Board
Mr Kevin Portelli	Representative

Department of Contracts

Dr Franco Agius	Legal Representative
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Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and stated that the PCRB had looked at all the technical issues on this contract, and following the opinion of an independent expert had already decided the outcome on those issues.

Dr Franco Agius, Legal Representative of the Director of Contracts, sought permission to produce a witness to explain why a re-evaluation of the complete tender was undertaken.

Dr Steve Decesare, Legal Representative for Computime Ltd stated that the expert had confirmed that Appellants' offer was technically compliant – that was the only point that was deficient at that stage of the evaluation. He could not see the point therefore of another evaluation. Under Regulation 93 of the Public Procurement Regulations once the PCRB has made a decision there is a limited time for appeal after which the decision of the Board is final and the successful bidder has executive title (Article 72 of the Code of Organisation and Civil Procedure).

Dr Agius quoted Article 15.1 under which he claimed, the Director of Contracts has the right to cancel the award of a contract. He quoted in support the Court of Appeal decision in an MCAST tender where an error was found after the PCRB decision and a re-evaluation of the tender was allowed. In this present Case the Director of Contracts had ordered the re-evaluation from scratch, and his decision had been justified and led to the disqualification of the previous preferred bidder.

Dr Decesare said that if the PCRB was to accept this ruling it would be tantamount to the Director of Contracts having the right to re-evaluate any contract where he does not agree with the Board's decision. Between 2013 and 2018 this Board asked for a re-evaluation with a new re-evaluation board on only six occasions. PCRB had given no instructions or indication of a re-evaluation in this Case, merely a continuation of the existing process. The only point of technical non-compliance was the one on which the independent expert was appointed.

Dr Agius said that in cases where the Director made a mistake or a wrong decision he looks again at the contract and forms a new evaluation board. This Board's instructions were specific – to re-integrate Appellants' offer. On reviewing the PCRB decision it transpired that the Director of Contract's original decision was wrong and he appointed a new evaluation board who had asked bidders a new set of questions. Appellant was trying to influence the decision by not replying to clarifications, and under those circumstances the evaluation board could not conclude that Computime was compliant.

Dr Decesare re-iterated that the only point in doubt in the technical evaluation was cleared by the independent expert. The existing Evaluation Board had only one outstanding issue to deal with as agreed by all the lawyers at that hearing and that was the financial offer.

The Chairman asked on what basis the Director of Contracts decided that the evaluation was not correct. He went on to state that the second evaluation board should not have started from scratch

– they should have simply moved on to the financial evaluation and should not have gone into the points already decided.

Dr Agius said that after studying the PCRB decision, the Director had appointed a new board ‘for a clean sweep’. This new board had no intention of disqualifying Computime- they disqualified themselves by failing to reply to clarifications sought.

Dr Decesare found it ironic that in the first hearing the Director of Contracts defended strongly the award of the tender to Merlin Computers Ltd, which his new evaluation board had now disqualified. The Director had approved of the expert appointed, and all had agreed that his decision was final. It seemed to Dr Decesare that all bids submitted by Computime were being challenged. The PCRB had made an order and his client did not have to reply to letters or clarifications which ignored that order. Contrary to what the Director is claiming there is no mistake in the tender as there is only one point at issue as decided by the PCRB.

The Chairman stated that the PCRB did not direct that a new evaluation board be formed. The Contracting Authority and the Director of Contracts gave assurances that there was only one point at issue, and the expert witness had confirmed that the technical offer was compliant.

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

This Board,

having noted this Objection filed by Computime Limited, (hereinafter referred to as the Appellants), on 20 August 2018, refers to the contentions made by the same Appellants with regards to the award of Tender of Reference CT 3033/2017, listed as Case No 1213 in the records of the Public Contracts Review Board and issued by the Planning Authority.

Appearing for the Appellants: Dr Steve Decesare

Appearing for the Contracting Authority: Mr Stephen Ferrito

Appearing for the Department of Contracts: Dr Franco Agius

Whereby, the Appellants contend that:

- a) **this case was already decided upon through the decision taken by this same Board on 1 March 2018 which was not contested by the parties concerned. Yet, this decision was completely ignored by the Director of Contracts and the Contracting Authority, by appointing a new Evaluation Committee and by initiating a fresh evaluation procedure.**

This Board has also noted the Contracting Authority's "*Reasoned Letter of Reply*" dated 23 August 2018 and its verbal submissions during the Public Hearing held on 27 September 2018, in that:

- a) **The Planning Authority contends that the Director of Contracts, upon establishing that there was a mistake in the original decision, appointed a new Evaluation Board to start the evaluation process afresh. In this regard, the Contracting Authority maintains that the Director of Contracts has the necessary authority to act in such a manner and to cancel the award of a contract, in accordance with Article 15.1 of the Public Procurement Regulations.**

This Board has been presented with an Appeal on which a decision has already been concluded and not contested by any of the parties concerned.

This Board would respectfully refer to the decision which was taken by the same on 1 March 2018, as follows:

1. “In view of the above, this Board:

- i) does not uphold the Planning Authority’s decision in the award of the Tender;*
- ii) upholds Computime Limited’s contentions and recommends that the deposit paid by the same is to be fully refunded;*
- iii) recommends that the Appellant’s offer is to be reintegrated in the Evaluation process.”*

This Board arrived at the above conclusions after having been reassured that Computime Limited’s offer was technically compliant except for the issue of “storage facility” of the system being offered. In this regard, this Board had appointed an independent expert who confirmed that the Appellants’ offer was more than compliant. Such a decision was not contested by any of the parties involved.

This Board would also confirm that, in its deliberations, it did not recommend that a new Evaluation Committee is to be appointed as it justifiably felt that the only pending technical issue was the issue of storage facility which had been resolved through the submissions of a technical report prepared by the appointed expert, so that, the same Evaluation Committee only had to carry out the financial assessment of

the tenders. Both parties had the opportunity to object to this Board's decision and the latter is not aware of any appeals made before the Court of Appeal in this regard.

This Board is somewhat concerned about the change of the evaluation procedure that took place after the decision of this Board, in that:

- The Evaluation Committee was changed to represent a new composition of members, whilst, at the same instance, this Board did not recommend such a change or composition of the Evaluation Committee;**
- The evaluation procedure was started afresh, so that what has been discussed and resolved during the Public Hearings which were held on 12 December 2017 and 15 February 2018 were totally ignored and discarded, including the final conclusions arrived at by this Board. In this respect, this Board notes that the final decision of this Board became effective on 1 March 2018;**
- On 3 May 2018, the Planning Authority requested clarifications on the technical issues which were not raised during the Public Hearings and in this regard, this Board would point out that it had all the**

reassurances, from the Contracting Authority, that what remained pending, insofar as technical issues were concerned, was the “*Storage Facility*” issue, which in turn was resolved through the expert’s report. This was not contested by the parties concerned, so that, in this respect, all the technical issues were resolved and this Board adjudicated that Computime Limited’s offer was to be re-integrated in the Evaluation process, so as to move on to the financial evaluation stage.

2. This Board would respectfully refer to the Contracting Authority’s “*Letter of Reply*” dated 23 August 2018, with particular reference to point 5, wherein it is being stated that:

“5. In observance of this decision, (PCRB decision of the 1st March 2018), Government reintegrated the objecting company in the award process and by means of a letter dated 3 May 2018, the Evaluation Committee requested a set of clarifications”

With all due respect, this Board opines that the opening sentence of the above mentioned paragraph is totally incorrect in that, the decision of this Board was not observed on two main issues, first, that this Board

did not recommend the appointment of an evaluation committee differently composed, and secondly, this Board did not conclude that the evaluation process was to be carried out afresh. On the contrary, this Board concluded that the existing Evaluation Committee, (at that time) will reintegrate the Appellants' offer in the evaluation process. In this regard, this Board would also insist that, as per Public Procurement Regulations process, the next evaluation course of action would have been the financial assessment stage of the offers.

3. This Board would also refer to the Planning Authority's claim, by way of a preliminary note, that the Appellants' refusal to entertain requests made by the Evaluation committee amounted to an attempt at "*arm twisting*" the Committee. In this regard, no evidence was presented to justify such a preliminary claim.

4. This Board would again refer to the Contracting Authority's "*Letter of Reply*", with particular reference to Point 17 as follows:

"17. At the outset the defendants humbly wish to point out that this Board in its previous decision has not decreed that the Tender is to be awarded to the objecting company but rather that the objecting

company is to be re-integrated in the evaluation process. This intrinsically means that the Evaluation Process must at best be carried out afresh....”

Again, this Board would state that such a statement is totally incorrect as the defendants are assuming facts which this Board did not recommend and these are:

- i) This Board did not recommend a fresh evaluation procedure;**

- ii) The Board did not conclude that an Evaluation Committee differently composed should be appointed for the very simple fact that Computime Limited’s offer was found to be, (and not contested), administratively and technically compliant – what remained was the financial assessment. In this regard, this Board would point out that when the necessity for the appointment of a new, differently-composed Evaluation Committee arose, this Board always included such instructions in its decision. In this case, it did not.**

5. The proposed cancellation of the Tender by the Contracting Authority has been stated to be due to the following three reasons:

- i) The first reason was that, the New Evaluation Committee detected a slight imprecision in the offer of the originally Recommended Bidder. In this regard, this Board opines that, such an imprecision in the original Recommended Bidder's offer does not justify the cancellation of a Tender, as otherwise the other competing bidders are penalised for any other Bidders' deficiencies in their offer. At the same instance, this Board was not presented with the nature of such imperfection. However, it was described as being slight which substantiates this Board's opinion even more;**

- ii) The second reason for cancellation is that another slight imprecision was found in another Bidder's offer which was placed third. Again, the opinion of this Board is that such a slight imprecision in the offer of the third ranked Bidder does not justify the proposed cancellation of the Tender;**

iii) The third reason is that the Appellants' did not reply to the request for clarifications.

In this regard, this Board notes that the Appellants replied to the clarification request in the form of a protest, contesting that such clarification requests refer to the technical specifications which were never queried before and which had been considered to be to the satisfaction of the then Evaluation Committee. In this regard, this Board confirms that the Planning Authority affirmed, (under oath), that all technical specifications pertaining to the Appellants' offer were compliant, except for the contested issue of "*storage facility*". This Board opines that Computime Limited's letter dated 10 May 2018 is justified in that what has been requested by the new Evaluation Board represent additional technical information after this Board had arrived at its decision on the case.

In this respect, this Board acknowledges the fact that the Director of Contracts has the authority to cancel a Tender under certain circumstances, but this authority cannot be used to overturn a decision that was not contested before the Court of Appeal. This Board is also

convinced that such circumstances in this particular case do not justify a cancellation of the Tender.

In view of the above, this Board,

- i) does not uphold the Planning Authority's decision to cancel the Tender;**

- ii) orders the Planning Authority to reintegrate Computime Limited's offer in the financial stage of the evaluation process;**

- iii) instructs the newly appointed Evaluation Committee to carry out the financial assessment on those offers which are administratively and technically compliant, whilst adhering to the decision of this Board dated 1 March 2018;**

- iv) recommends that the deposit paid by the Appellants should be fully refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

16th October 2018