

PUBLIC CONTRACTS REVIEW BOARD

Case 1220 – CT 3070/2018 –Tender for the Supply, Installation and Commissioning of IT Equipment for VET Laboratories in Malta and Gozo

The publication date of the call for tenders was the 9th May 2018 whilst the closing date of the call for tenders was 19th June 2018. The estimated value of the tender (exclusive of VAT) was € 276,687.25.

On the 24th September 2018, Al Nibras for Science and Technology filed an appeal against the Ministry for Education and Employment as Contracting Authority objecting that they were disqualified on the grounds that they were technically non-compliant and the tender was cancelled. A deposit of € 1,383 was paid

There were two (2) bidders.

On 16th October 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 – Al Nibras for Science and Technology

Dr Mario Ciliberti	Legal Representative
Mr Roderick Abela	Representative

Contracting Authority – Ministry for Education and Employment

Ms Daniela Zerafa	Chairperson Evaluation Board
Mr Jurgen Carl Grixti	Secretary Evaluation Board
Mr Josmar Borg	Member Evaluation Board
Ms Lydia Chircop	Member Evaluation Board
Mr Sean Mahoney	Member Evaluation Board
Ms Mary Anne Borg	Representative

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and invited submissions.

Dr Marco Ciliberti, Legal Representative of Al Nibras for Science and Technology, stated that on a point of procedure he wished to draw the Board's attention to the fact that the letter of rejection claiming non-compliance merely stated that Bidder had failed to submit an Energy

Efficiency Report. On the 4th October 2018 the Ministry for Education had confirmed that this Energy Report was not required in the first place. His client's Appeal was based solely on this point.

Mr Jurgen Carl Gixti said that the specified literature as originally requested had not been received.

The Chairman pointed out that the Board relies solely on the documents presented to it. The letter of rejection specifically stated that the Energy Report was missing – when it was not required in the first instance. However, due considerations will be taken on the merits of the Appellants' Grievances.

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

This Board,

having noted this Objection filed by Al Nibras for Science & Technology, (hereinafter referred to as the Appellants), on 24 September 2018 refers to the contentions made by the same with regards to the Cancellation of Lot No 1 in Tender of Reference CT 3070/2018 issued by the Ministry for Education and Employment and listed as Case No 1220 in the records of the Public Contracts Review Board.

Appearing for the Appellants:

Dr Marco A Ciliberti

Appearing for the Contracting Authority

Ms Daniela Zerafa

Whereby the Appellants:

- a) insist that the reason given by the Contracting Authority for the rejection of their offer, was that they did not submit the “energy**

efficiency report”. In this regard, the Appellants maintain that, in this particular lot of the Tender, such a report was not required and this was duly confirmed by the Authority itself, in its “*Reasoned Letter of Reply*” dated 4 October 2018;

- b) contend that they had replied to the clarification request dated 25 July 2018, submitting all the requested information on 27 July 2018 through the digital file bearing the name “*rectifications.zip*”, for which a receipt was received by the same Appellants on the same date.

This Board has also noted the Contracting Authority’s “*Letter of Reply*” dated 4 October 2018 and its verbal submissions during the Public Hearing held on 16 October 2018, in that:

- a) The Ministry for Education and Employment confirms that it erroneously requested the “*Energy Efficiency Form*”, as in this particular Lot of the Tender, such a report was not required;
- b) The Contracting Authority however insists that the Appellants failed to submit a reply to the clarification request dated 25 July 2018.

This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, opines that this Appeal should be treated only on the documentation submitted and not on other issues which were neither mentioned in the “*Letter of Rejection*” as the reasons for the discarding of the Appellants’ Bid, nor in the “*Letter of Objection*” submitted by Al-Nibras for Science and Technology.

This Board would like to also respectfully refer to the “*Letter of Rejection*” dated 11 September 2018 wherein the reasons given by the Contracting Authority for rejecting the Appellants’ offer were twofold namely,

- i) The non-submission of the “*Energy Efficiency Form*” as duly requested in Section 7 (a) (vi) for Lot No 1;**

- ii) The fact that no reply was received by the Ministry for Education and Employment to the Clarification request dated 25 July 2018.**

- i) The non-submission of the “*Energy Efficiency Form*” as duly requested in Section 7 (a) (vi) for Lot No 1**

Regarding this issue, this Board refers to the third paragraph of the Ministry's "*Reasoned Letter of Reply*" dated 4 October 2018 which states that,

"Regarding the request for the Energy Efficiency Form, MEDE contends that it did erroneously ask for the Energy Efficiency Form therefore the Bidder is right in stating that the Energy Efficiency Form was not required."

The above quoted paragraph confirms without any reasonable doubt that Al-Nibras for Science and Technology was not required to submit such information and in the regard, this Board upholds the Appellants' First Contention.

- ii) The fact that no reply was received by the Ministry for Education and Employment to the Clarification request dated 25 July 2018.

With regards to the Appellants' second contention, this Board would, again, refer to the above mentioned clarification request, wherein the following items were requested:

“Moreover, kindly forward the missing literature for all technical specifications pertaining to the following items:

- *Item 1.01 – Workbench for teachers*
- *Item 1.02 – Workbench for technicians*
- *Item 1.03 – Workbench for students*
- *Item 1.04 – Workbench for wheelchair users*
- *Item 1.06 – Anti-static static wrist band*
- *Item 1.07 – Screwdriver holder*
- *Item 1.08 – Plier holder*
- *Item 1.09 – A4 sleeve*
- *Item 1.11 – Dolly”*

The above information was contained in the same clarification request mentioned in the Ministry for Education and Employment’s “*Letter of Rejection*” dated 11 September 2018, and since the Contracting Authority claims that it did not receive a reply from the Appellants, the latter’s offer was deemed to be administratively non compliant, so that the real reasons for the discarding of the Appellant’s offer were given in substance, although the inclusion of specific missing documentation

referred to in the clarification request, would have presented a wider spectrum of the reasons.

In this regard, the Appellants contend that they have submitted the requested information through the digital file bearing the name “*rectifications.zip*”, for which a receipt was given.

From the documentation available, this Board would refer to a reply from the service provider of the system, addressed to the authority as follows:

“Dear Jason,

further to our technical investigation, the user “0385269M1615” uploaded a document (with zero length file) as an attachment in his evaluation clarification response. Zero length files cannot be used by the system, as it is the case by almost all applications and thus it cannot be properly processed so that it is made available to the end-users. Zero-byte files may arise in cases when during the creation of the file by a program/application, the process is aborted or is interrupted prematurely while writing to it (i.e. the application crashes).”

From the above communication dated 4 October 2018, this Board notes that, as declared by Al-Nibras for Science and Technology , a receipt to

the response to the clarification request was effected on 25 July 2018, so that, it can be established that, in some form or other, the Appellants did reply, however, they uploaded a “zero length file” which, according to the technical operators, cannot be properly processed.

This Board notes that the Appellants uploaded a file which cannot be used in the system, so that although they replied to the communications received from the Contracting Authority, the system itself could not process such communication to the end user. In this respect, the Evaluation Committee had no other option but to deem such a circumstance as a non reply to the clarification request.

In this regard, this Board would emphasize that it is the responsibility of the Bidder to ensure that he submits the reply to clarification requests in the correct form and through the proper procedure of the system. It is a fact that the Appellants submitted an attachment to the clarification request, however, the same communication, was not accessible to the Authority.

In view of the above, this Board,

- i) upholds the Ministry for Education and Employment’s decision to cancel the Tender for Lot No 1;**

ii) upholds Al-Nibras for Science and Technology's first contention;

iii) does not uphold the Appellants' second grievance, however, due to the circumstances pertaining to the technical nature, this same Board recommends that the deposit paid by the latter should be fully refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

23rd October 2018