

PUBLIC CONTRACTS REVIEW BOARD

Case 1252– CT 2167/2018 – Tender for the Renovation, Alteration and Additions in an environmentally friendly manner to an Existing Block situated at Safi Ranges Barracks, Allied Forces of Malta Lot 2

The publication date of the call for tenders was the 5th June 2018 whilst the closing date of the call for tenders was 19th July 2018. The estimated value of the tender (exclusive of VAT) was € 380,000.

On the 16th November 2018 Yes Services Ltd filed an appeal against the Armed Forces of Malta (AFM) as the Contracting Authority objecting to being disqualified on the grounds that their offer was technically not compliant. A deposit of € 1,900 was paid.

There were four (4) bidders.

On 17th January 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants: Yes Services Limited

Dr Paul Farrugia	Legal Representative
Mr Glyn Gareth Clews	Representative

Recommended Bidder: ASE Electrical & Plumbing Supplies Limited

Dr Daniela Azzopardi Bonanno	Legal Representative
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Contracting Authority – Armed Forces of Malta

Major Neil Hampton	Chairman Evaluation Committee
Lieut Shaun Ciantar	Secretary Evaluation Committee
Capt Michael Agius	Member Evaluation Committee
Capt Matthew Zammit	Member Evaluation Committee
Lieut Keith Grixti	Member Evaluation Committee
Major Keith Mizzi	Representative
WOII Johan Miruzzi	Representative

Department of Contracts

Dr Franco Agius	Legal Representative
Dr Sirole Bezzina Gatt	Legal Representative

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

Dr Paul Farrugia Legal Representative of Yes Services Ltd outlined the reason for Appellants' exclusion. By letter dated 16th November 2018 a rectification instead of a clarification was sought by the Contracting Authority after documents had been submitted. As far as the Appellants were concerned there was originally a mistake on the part of the AFM which prevented the possibility to upload documents. The AFM subsequently submitted a clarification note. His clients submitted offers for two lots with an 8 month period for Lot 1 and 4 month period for Lot 2 including a Gantt chart indicating that in 8 months he would complete both lots overall. This was later specified in a letter sent to the Authority. On 30th August 2018 the AFM requested clarification on Lot 2 and Appellant submitted a Gantt chart – in reply the AFM requested a rectification although in fact what they wanted was a clarification, and the bid was therefore refused.

Mr Glyn Gareth Clews (194682M) called as a witness on behalf of the Appellant firm, testified on oath that after the request from the AFM Appellants submitted a Gantt chart (tabled as Doc 2) giving a description of the work, indicating that construction would take 4 months followed by 4 months finishing work – meaning they would be starting Lot 2 before finishing Lot 1 – they had looked at the job overall instead of in parts. When clarification was sought Appellant had submitted a further Gantt chart (tabled as Doc 1).

In reply to question from Dr Franco Agius, Legal Representative of the Director of Contracts, witness confirmed that their rectification Gantt chart for Lot 1 had covered both Lots but in Gantt chart marked as Doc 2 there was no reference to Lot 1. The later Gantt chart for Lot 2 (tabled as Doc 3) indicated that it would take 5 months for Lot 2 starting from the 4th month of Lot 1 – that is allowing one month for preparatory work on Lot 2. .

Major Neil Hampton (82180M) called as a witness by the Board, testified on oath that he was the Chairman of the evaluation committee. The tender specified two lots. Lot 1 covered construction work and was to be completed in 8 months and Lot 2 was for electrical and mechanical work to be completed within 4 months of the date of the order. Appellants' offer for Lot 2 was of 5 months duration, and of 8 months completion. The Gantt chart indicated that Lot 2 would be using all the 8 months allocated for Lot 1 for both Lots.

Dr Paul Farrugia stated that there was no doubt that Appellant followed the correct course in answering the clarifications. Appellant had indicated in writing that by the 4th month of Lot 1 they mobilised ready for Lot 2. They were still compliant as they could not start on Lot 2 till after completion of Lot 1. On the other hand one had to prepare for Lot 2 in advance.

Dr Franco Agius said that the programme of works submitted indicated that for Lot 2 Appellant would be taking 8 months. Each one of the Lots was a separate contract and it should therefore have been compartmentalised. Documents presented after clarification fall within Note 3.

Dr Daniela Azzopardi Bonanno Legal Representative of ASE Electrical and Plumbing Supplies Ltd commented that Appellants were assuming that both Lots would be going to one bidder. No rectification was possible if the first submission failed.

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

This Board,

having noted this Objection filed by Yes Services Limited, (hereinafter referred to as the Appellants) on 16 November 2018, refers to the contentions made by the same Appellants with regard to the award of Tender of Reference CT 2167/2018 listed as Case No 1252 in the records of the Public Contracts Review Board and awarded by the Armed Forces of Malta, (hereinafter also referred to as the Contracting Authority).

Appearing for the Appellants: Dr Paul Farrugia

Appearing for the Contracting Authority: Major Neil Hampton

Appearing for the Department of Contracts: Dr Franco Agius

Whereby the Appellants contend that,

- a) upon a request from the Contracting Authority, they submitted a Gantt Chart indicating that works for Lot 2 would take five months instead of four. In this regard, the Appellants maintain that the extra month was designated for preparatory work and the execution period was of four months as requested in the Tender Document.**

b) upon a request for clarification from the Contracting Authority, they submitted a Gantt Chart which confirmed the original submission.

This Board has also noted the Contracting Authority's "*Reasoned Letter of Reply*" dated 4 December 2018 and their verbal submissions during the Public Hearing held on 17 January 2019, in that:

a) The Armed Forces of Malta insist that the Gantt Chart submitted by the Appellants for Lot 2 denoted duration of five months, which period is not in accordance with the Tender Requirements. In this regard, such an issue falls under Note 3, so that no rectification is possible;

b) The Contracting Authority also confirms that although the request was denoted as a rectification, in fact, it was a clarification request, as the text of the same proves.

This same Board has also noted the testimony of the witnesses, namely:

1. Mr Glyn Gareth Clews who was duly summoned by Yes Services Limited;

2. Major Neil Hampton who was duly summoned by the Public Contracts Review Board.

This Board has also taken note of the documents submitted by Yes Services Limited which consisted of two Gantt Charts marked as Doc 1 and Doc 2.

This Board, after having examined the relevant documentation to this Appeal and heard the submissions made by the interested parties, including the testimony of the witnesses duly summoned, opines that the issues that deserve consideration are twofold namely:

- 1) The submissions made by Yes Services Limited;**
- 2) The replies made by Yes Services Limited to the clarification requests.**

1) The submissions made by Yes Services Limited

First and foremost, this Board would respectfully point out that the Evaluation Committee, in their deliberations, are bound to adhere to the principles of equal treatment, transparency and self-limitation. At the same instance, the Evaluation Committee can only assess an offer on the submissions made by the Bidder, who is ultimately responsible for his own submissions and who has to ensure that what he submits is in accordance with what has been mandatorily requested in the Tender Dossier. In this particular case, the Appeal is being made on Lot No 2 which consists of:

- **Mechanical and Electrical services plans and schematics, (where appropriate)**
- **Photometric data indicating Lux Levels for Perimeter Areas**

This Board would also refer to Section 3, (special conditions) with particular reference to Article 32.1, wherein it is clearly stating that,

“Lot 2 has a completion period of four months from the date of the order to start work.”

In this regard, this Board notes that the Tender consisted of two Lots, namely Lot 1 and Lot 2. Lot 1 consisted of civil works, and therefore the Lot under Appeal can only start after all the works in Lot 1 are completed within the mandatory period of eight months.

Yes Services Limited, in their original submission, (programme of works), submitted a Gantt Chart which did not indicate where, in their technical offer, it is shown that the completion of works for Lot 2 will be executed and completed within a period of four months as mandatorily dictated in Section 3, article 32 of the Tender Document as follows:

“Rectification No 3 – Lot 2

Reference is being made to your submission of the graphic work schedule. Kindly indicate where in your existing technical offer, the periods of execution of works conforms with Section 3 Article 32 of the Tender Document. This states that work is to be completed within four months from the date of the order to start work for Lot 2.”

Although, this request is denoted as a “*rectification*”, this Board opines that such a request is a “*clarification*” on what the Appellants have already submitted and not as incorrectly denoted in the request.

This Board has also noted that after such a request, Yes Services Limited submitted a Gantt Chart showing a works programme of Lot 1 and Lot 2, showing the execution of Lot 2 during a period of 5 months, as follows:

Calendar Months	1	2	3	4	5	6	7	8
Lot 1								
Award of Contract								
Mobilisation/Establishment of Site Offices								
Design Preparation for Approval of New Block								
Procurement of Material								
Structural Repairs & Roof Replacement								
Construction of Additional Floors on Existing Building								
Construction of a new 2 storey building								
Finishings								
Landscaping & Sewage Works								
Finishings								
Lot 2								
Calendar Months	1	2	3	4	5	6	7	8
Electrical & Mechanical Services								

First and foremost, this Board notes that from the above programme of works, the Appellants confirm that the civil works will be executed in eight months, as duly dictated in Section 3, Article 32 of the Tender Document and whilst the latter article also stipulated that Lot 2 has to be executed and completed within a period of four months, Yes Services Limited are clearly indicating that Lot 2 will be carried out over a period of five months, the latter period is not in accordance with the requirements of Section 3, Article 32 of the Tender Document.

At this stage of consideration, this Board would point out that Yes Services Limited's original submission did not indicate the duration of execution of Lot 2's works and the Appellants were given the opportunity to indicate the period of the execution of the latter lot, however, on submitting the Gantt Chart, the Appellants submitted that Lot 2 will be carried out within five months, which is outside the duration period so dictated in the Tender Document. In this regard, this Board confirms that the Appellants' programme of works for Lot 2 is not in accordance with the dictated requirements.

2) The replies made by Yes Services Limited to the clarification requests.

As stated earlier, this Board does not regard the Armed Forces of Malta's request as a "*Rectification Request*", so much so that, the contents of the request itself is stating that what the Contracting Authority is asking for was an indication of the execution period for Lot 2 in the already submitted documentation.

The Appellants' reply which consisted of a Gantt Chart showed that the execution period for Lot 2 was five months, so that quite appropriately, the Evaluation Committee could not accept such an execution period as the latter is bound by the principle of self limitation.

On a final note, this Board would remind the Appellants that it is their duty and obligation, prior to their submissions, to ensure that the information submitted upon the Contracting Authority's request, is in accordance with what has been dictated in the Tender Document.

In view of the above, this Board,

- i) does not uphold the contentions made by Yes Services Limited;**

ii) upholds the Armed Forces of Malta's decision in the award of the Tender;

iii) directs that the deposit paid by the Appellants should not be refunded

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

29^h January 2019