

## **PUBLIC CONTRACTS REVIEW BOARD**

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### **Case 1253 – CT 3092/2018 – Tender for the Construction of a Passenger Canopy at the Bus Terminus in Valletta**

The publication date of the call for tenders was the 27<sup>th</sup> April 2018 whilst the closing date of the call for tenders was 5<sup>th</sup> June 2018. The estimated value of the tender (exclusive of VAT) was € 529,661.02

On the 9<sup>th</sup> November 2018 E & L Enterprises Ltd filed an appeal against Transport Malta as the Contracting Authority objecting to being disqualified on the grounds that their offer was financially not compliant and against the cancellation of the tender. A deposit of € 2,648 was paid.

There were five (5) bidders.

On 17<sup>th</sup> 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: E & L Enterprises Ltd**

Dr Michael Grech	Legal Representative
Dr Shaheryar Ghaznavi	Legal Representative
Mr Joseph Camilleri	Representative

#### **Contracting Authority – Transport Malta**

Dr Matthew Cutajar	Legal Representative
Arch Antoinette Conti	Chairman Evaluation Committee

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

Dr Michael Grech Legal Representative of E & L Enterprises Ltd said that he wished to start his submissions by calling a witness.

Mr Edward Camilleri (507395M) testified on oath that he was the Commercial Manager of the Appellant firm and was involved in compiling the submissions for the tender. The tender consisted of a design concept of a canopy with all specifications and measurements given. It was

basically a build and install job with minimum tolerance in the amount of variations allowed (Design drawings tabled as Doc 1). Any questions asked by the Contracting Authority had been replied to in good time. Witness was of the opinion that there was no room for variations in the contract as there were no hidden facts and no element of surprise as all the work was above ground. In reply to questions witness stated that technical experts were consulted prior to tendering – these included an architect, an engineer, quality assurance and health and safety experts. Any possible variations were discussed with these experts.

Architect Antoinette Conti (214180M) called as a witness by Appellants testified on oath that she had prepared the drawings for the canopy and was the Chairperson of the evaluation committee. She confirmed that the design drawings that had been tabled (Doc 1) were the ones prepared by her, and the bidder had to develop the concept there from. Articles 35.8 and 35.9 of the special conditions of the tender documents limited variations to 10% under one heading and 10% on another. After going through the evaluation process the committee sought a clarification on the maintenance costs (listed in the BOQ as Items 2(i) and 2 (ii)) of the structure and they were satisfied when the bidder assured the Contracting Authority that these will be provided at zero cost.

Witness stated that Appellants were disqualified as they failed to complete the part of the Bill of Quantities that dealt with the Breakdown of Item Rates, and which had to be filled in at the bidding stage. The evaluation committee wanted to ensure that all information was supplied, and if there was any doubt questions were asked. Having gone through the administrative, technical and financial evaluation process, they were advised by the Director of Contracts that they could not seek clarification on the missing document. In reply to a question witness confirmed that any information on the missing form did not affect the overall price tendered.

The Chairman pointed out that according to the tender specifications the Breakdown of Item Rates had to be submitted with the tender. The specific words used were ‘to be filled in at the bidding stage as part of the submission bid’ and there was no point in arguing that this was an optional item or for guidance only. The tender document is a contract and the Board had to ensure that the correct procedures were followed.

Dr Ghaznavi, Legal Representative of the Appellant firm mentioned that in a previous Case heard by the Board they had allowed a change of personnel in a tender – this was similarly a small administrative deficiency on which they should allow a correction.

Dr Grech said that the tender was to be awarded on a lump sum basis and therefore the missing form was unnecessary as it would not influence or change the final price. The only criterion of the financial part was the price – no rectification had been sought in the price as there was nothing wrong from this aspect. He wondered what relevance the missing form has to the tender value – if one applied the principle of proportionality then the value of the form would be zero since this was a lump sum tender and therefore it should not have been disqualified.

Dr Matthew Cutajar, Legal Representative of Transport Malta said that Appellants were trying to use the proportionality principle to undermine the evaluation process. It was up to Appellants to ensure that they completed their submissions correctly and totally and arguing that shortcomings did not make a difference was futile.

The Chairman said that there would be no justification in letting a tender be cancelled if everything was right and in order. Regrettably the missing document prevents the Board from saving this tender - similarly the Contracting Authority has no interest in issuing a tender then capriciously cancelling it.

He then thanked the parties for their submission and declared the hearing closed.

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**This Board,**

**having noted this Objection filed by E & L Enterprises Limited, (hereinafter also referred to as the Appellants) on 9 November 2018, refers to the contentions made by the same Appellants with regard to the cancellation of Tender of Reference CT 3092/2018 listed as Case No 1253 in the records of the Public Contracts Review Board and issued by Transport Malta.**

**Appearing for the Appellants:**

**Dr Michael Grech**

**Dr Shaheryar Ghaznavi**

**Appearing for the Contracting Authority:**

**Dr Matthew Cutajar**

**Whereby the Appellants contend that:**

- a) their main contention is that their offer was considered to be financially non compliant due to the simple fact that they failed to submit details**

**relating to an itemised breakdown representing various price elements leading to the global price offered. In this regard, the Appellants maintain that the award criterion was the price and that they have quoted the same as dictated in the Tender Document;**

- b) the Evaluation Committee should have applied the principle of proportionality. In this regard, the Appellants insist that the non-submission of the breakdown of the quoted price should not be regarded as a detriment of substance in the Appellants' offer.**

**This Board has also noted the Contracting Authority's "*Reasoned Letter of Reply*" dated 19 November 2018 and its verbal submissions during the Public Hearing held on 17 January 2019, in that:**

- a) Transport Malta insist that the mandatory document showing an itemised breakdown of the global price, has an important impact in a wide ranging sphere and formed part of the financial offer. In this regard, the Appellants failed to submit such a document;**

**b) The Contracting Authority also maintains that it could not apply the proportionality principle due to the simple fact that this was a case of a missing mandatory document.**

**This same Board has also noted the testimony of the witnesses duly summoned by E & L Enterprises Limited, namely,**

**1. Mr Edward Camilleri;**

**2. Architect Antoinette Conti**

**This Board has also taken note of the documents submitted by E & L Enterprises Limited which consist of design drawings marked as Doc 1.**

**This Board, after having examined the relevant documentation to this Appeal and also heard submissions made by the parties concerned, including the testimony of the witnesses, opines that the issues which merit consideration are twofold namely:**

**1. The submissions made by E & L Enterprises Limited**

**2. The application of the Principle of Proportionality.**

**1. The submissions made by E & L Enterprises Limited**

**From the documentation which was made available to this Board, it was noted that the Appellants' offer was administratively and technically compliant. However, during the financial stage of the Evaluation Process, it became evident that E & L Enterprises Limited did not submit the requested breakdown of itemised rates leading to the lump sum offered by the same.**

**One has to refer to the missing documentation which had to describe with relevant rates the composition of the global or lump sum quoted. At the same instance, it is important to quote that the breakdown of these rates were to be filled in at the bidding stage and formed part of the submission bid.**

**At this stage of consideration, one cannot but note that E & L Enterprises Limited were well aware of the fact that such documentation had to be submitted with their offer and in this respect, this Board notes that the Appellants failed to do so, hence missing mandatory documentation. In this regard, this Board also notes that**

**this documentation formed part of the financial offer and was governed by Note 3 which does not allow any rectifications whatsoever. The fact that the mandatory documentation was missing from the original bid precluded the Evaluation committee from requesting any clarifications as through the latter request, the same Evaluation Committee would have allowed a change to the Appellants' Original Offer and would have breached the principles of equal treatment, transparency and self limitation. In this regard, this Board credibly establishes that E & L Enterprises Limited failed to abide by the requirements as so dictated in the Tender Document.**

**At the same instance, this Board would point out that the requirement of the submission of the itemised breakdown of the lump sum was not capriciously dictated by Transport Malta in that, it is not only a right for the Contracting Authority to impose such a requisite but it is also an obligation on the latter to be well informed, in so far as the knowledge of the rates which are to be applicable, as a basis, for any variations in the future during the execution of the tendered works. In this regard, this Board justifiably establishes that the missing documentation formed part of the Financial Offer and carried an important impact on**

**any future variations. After having considered the merits of this issue, this Board would also point out that no justifiable cause was presented by the Appellants for the non-submission of this mandatory document. In this regard, this Board does not uphold E & L Enterprises Limited's first contention.**

## **2. The Application of the Principle of Proportionality**

**With regards to the Appellants' Second Contention, in that the Evaluation Committee should have applied the principle of proportionality, this Board would point out that to determine whether the principle of proportionality applies, one has to consider two important instances, whether the measure at issue:**

- a) is appropriate for attaining the objective pursued;**
  
- b) goes beyond what is necessary to achieve the objective.**

**With regards to the first yardstick mentioned above, this Board considered the importance of the submission of the itemised breakdown**

**of the global price quoted by the Appellants, and the objective pursued in the submission of this mandatory requirement is evidently justified, so that the missing documentation can have an adverse impact on future variations of the objective being pursued by the Contracting Authority.**

**With regards to the second measure, the requirement of the submission of a breakdown of the itemised lump sum is reasonable, justified and yet it does not go beyond what is necessary for Transport Malta to achieve, it simply requires a breakdown of the Appellants' declared lump sum.**

**In this regard, this Board does not find any justifiable cause or instances why the principle of proportionality should have been applied by the Evaluation Committee. This Board would also point out that, in this particular case, a missing mandatory yet important document was not submitted by the Appellants, hence their financial offer was not complete and no clarification on missing documentation can be made and therefore E & L Enterprises Limited's offer was appropriately deemed as financially non-compliant. At the same instance, the**

**principle of proportionality, in this particular case, should not be applied to correct an original offer and thus making such offer fully compliant. Once an offer is not compliant, it remains such even in the future.**

**In this regard, this Board does not uphold the Appellants' second contention.**

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

- i) does not uphold the contentions made by E & L Enterprises Limited;**
- ii) upholds Transport Malta's decision to cancel the Tender;**
- iii) directs that, in view of the fact that the Tender has been cancelled, an amount of € 2000, (two thousand Euro) from the deposit paid by the Appellants, is to be refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*24<sup>th</sup> January 2019*