

## **PUBLIC CONTRACTS REVIEW BOARD**

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### **Case 1255 – CT 3216/2018 – Tender for the Supply, Delivery, Testing and Commissioning of Seismic Simulation Equipment at the University of Malta**

The publication date of the call for tenders was the 12<sup>th</sup> October 2018 whilst the closing date of the call for tenders was 13<sup>th</sup> November 2018. The estimated value of the tender (exclusive of VAT) was € 370,000.

On the 18th December 2018 Technoline Ltd filed an appeal against the University of Malta as the Contracting Authority objecting to being disqualified on the grounds that their offer was not technically compliant. A deposit of € 1,850 was paid.

There were two (2) bidders.

On 22nd January 2019 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:

#### **Appellants - Technoline Ltd**

Dr James Muscat Azzopardi	Legal Representative
Mr Justice Godwin Muscat Azzopardi	Legal Representative
Dr Maria Grech	Legal Representative
Mr Godfrey Camilleri	Representative
Mr Christopher Cusens	Representative

#### **Recommended Bidder – Servotest Testing Systems Ltd**

Mr George Taylor	Representative
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#### **Contracting Authority – University of Malta**

Dr Oriella De Giovanni	Legal Representative
Mr Tonio Mallia	Chairman Evaluation Committee
Ms Claire Saliba	Member Evaluation Committee

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

Dr James Muscat Azzopardi Legal Representative of Technoline Ltd said his clients were appealing on a technical point on which they had been disqualified – namely that the seals offered by his clients were high pressure seals when the tender asked for low pressure ones. The manufacturer of these seals was a global producer and expert in this field and what was offered exceeds the tender requirements, and could easily fulfil the requirements of the tender.

On a second point Dr Muscat Azzopardi said that it appeared as if two weights and two measures had been used in the evaluation of the tender and his clients had been treated differently in that the other bidder was allowed a clarification to correct a figure and it was difficult to justify the fact that only one side had been given this opportunity.

Mr Tonio Mallia Representative of the University of Malta stated that the tender requested low pressure seals for sensitive equipment. Technoline offered high pressure seals. He quoted from literature supplied by Parker, (paragraph 3.1.3) manufacturers of the high pressure seals offered, which specified clearly the difference in function between the types of pressure seals. The university had a particular requirement for equipment simulating seismic movements and the type of seal used made a difference in the results obtained. With regard to the clarification referred to by Appellants this was asked simply to include the cost of the Service Level Agreement and followed the Public Procurement Regulations and the directions of the Director of Contracts.

The Chairman pointed out that the tender stipulated low pressure seals and there was obviously a difference between the different types of seals. The evaluation committee was tied to the principle of self – limitation. Why was it that if the Contracting Authority had asked for low pressure seals something different had been offered?

Dr Muscat Azzopardi said what his client had offered was a higher specification than requested, and although the tender specified low pressure seals what had been offered could also fulfil that function.

Dr Oriella De Giovanni Legal Representative of the University of Malta referred Appellants to paragraph 19 of their submission in which they stated ‘No Low pressure seals/Only High pressure seals’

Referring to the query why only one side was allowed to clarify a submission, Mr Mallia stated that there was a discrepancy noted when opening the schedule of prices – this was an arithmetical correction which was allowed.

Ms Claire Saliba Secretary of the Evaluation Committee explained that when the committee opened the EPPS schedules the amount stated did not agree with the bid form. The EPPS showed a figure of € 448,000 while the financial bid showed a figure of € 553,000. Bidder was asked to clarify the correct amount and it transpired that the financial bid, apart from the Service Level Agreement, had also included an optional unit which was not required, and which bidder was asked to remove from his price, following the advice of the Department of Contracts.

The Chairman commented that the remit of the Board was to follow the PPR. He then thanked both parties for their submissions and declared the hearing closed.

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**This Board,**

**having noted this Objection filed by Technoline Limited, (hereinafter also referred to as the Appellants), on 18 December 2018, refer to the contentions made by the latter with regard to the Tender of Reference CT 3216/2018 listed as Case No 1255 in the records of the Public Contracts Review Board, awarded by the University of Malta, (hereinafter also referred to as the Contracting Authority).**

**Appearing for the Appellants: Dr James Muscat Azzopardi**

**Mr Justice Godwin Muscat Azzopardi**

**Appearing for the Contracting Authority: Dr Oriella de Giovanni**

**Whereby, the Appellants raised two grievances:**

- a) their first contention refers to the alleged reason given by the Contracting Authority for their offer's rejection, in that, the high pressure seals offered, are not in accordance with the requirements of the Tender. In this regard, the Appellants maintain that the seals**

**offered exceeded the requirements and could therefore easily fulfil the requirements as dictated in the Tender Document.**

- b) the Preferred Bidder was allowed to correct a figure in his financial offer by means of a clarification. In this respect, the Appellants maintain that the Evaluation Committee did not treat all Bidders on a level playing field basis.**

**This Board has also noted the Contracting Authority's "*Letter of Reply*" dated 7 January 2019 and also its verbal submissions during the Public Hearing held on 22 January 2019, in that:**

- a) The University of Malta maintains that the Tender Specifications dictated the requisite of "*low pressure seals*", however, the Appellants, in their submissions confirmed that they could only supply "*high pressure seals*." In this regard, the Contracting Authority deems the Appellants' offer as technically non-compliant;**
- b) The University of Malta also contend that the correction in the price of the Servotest Testing Systems Limited consisted of an arithmetical correction, which is allowed as duly stated in the Tender Document.**

**This same Board has also noted the testimony of Ms Claire Saliba, Secretary of the Evaluation Committee, who was duly summoned by the Public Contracts Review Board.**

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

- 1. The submissions made by Technoline Limited;**
- 2. The correction of Servotest Testing Systems Limited's price**

**1. The submissions made by Technoline Limited**

**First and foremost, this Board would respectfully refer to Section 4, Article 4.3.1.1 (d) where it is specifically dictated that the General Machine's specifications should contain "*easily maintained low pressure seals*", so that the Contracting Authority requested such specifications with regards to this particular item.**

**This Board would also refer to the Technoline Limited's offer in this regard wherein, it was vividly declared by the latter that with reference**

to Spec 4.3.1.1 (d), *“No low pressure seals/only high pressure seals”*. Without entering into the technical merits as to why the Contracting Authority requested *“low pressure seals”*, this Board would opine that there must be a difference between low and high pressure seals and these two different specifications of seals would logically have different functions, so that the Contracting Authority had a justifiable technical reason for dictating *“low pressure seals”*.

One has to appreciate that both the Bidder and the Evaluation Committee are bound by the principle of self-limitation and in this respect, a quote from the judgement delivered on 6 February 2015 by the Court of Appeal (Superior) in the case *SR Environmental Solutions Limited vs Dipartiment tal-Kuntratti* will affirm the importance of the adherence to this basic yet important principle, as follows:

*“Ghandu jingħad in princìpju li kull min huwa involut fil-proċess ta’sejħa pubblika, inkluż ukoll dawk li huma mgħobbija bl-oneru li jiġġudikaw is-sejħa, huma kollha marbutin bil-kundizzjonijiet li jkunu mniżżla fid-dokumentazzjoni tas-sejħa.”*

**The above judgement is self explanatory in that, the conditions and technical specifications, in a Tender Document, must be respected and strictly adhered to by all the interested parties to the Tender. In this particular case, the University of Malta requested “*low pressure seals*” and Technoline Limited had to abide by such a technical specification; despite this, the latter declared in their offer that only “*high pressure seals*” can be provided.**

**With regards to the Appellants’ argument, in that they had offered a product which exceeds this tender requirement, this Board would respectfully refer to a judgement delivered by the Court of Appeal (Superior) on 24 June 2016 in the case *Transport Services for Disabled Person Cooperative Limited vs Id-Direttur Ġenerali tal-Kuntratti*, wherein it was held that:**

***“Jibqa’ l-fatt pero’ li għalkemm il-vetturi offruti kienu “the best value for money” ma humiex konformi ma’dak mitlub. Din il-qorti, f’kazijiet simili mhux l-ewwel darba li kkonfermat il-prinċipju li offerent, anke jekk joffri prodotti aħjar, għandu jkun skwalifikat jekk il-prodott offrut ma jkunx***

*skont kif indikat fis-sejha. Il-principju ta'trasparenza jrid li l-kumitat t'evalwazzjoni jimxi mad-dettalji tekniċi kif imnizzla fid-dokument tas-sejha u mhux jiddeċiedi li jagħżel liema li jidhirlu li hi l-aħjar offerta.”*

**This Board justifiably points out that conditions and technical specifications, in a tender document, are stipulated by the Contracting Authority and the bidder must abide by all the conditions laid out in the Tender Dossier. If, however, the Bidder had any particular doubt and in this particular case, the Appellants were well aware that they could not supply, “*low pressure seals*”, the latter had the remedy to clarify this deficiency with the Contracting Authority, prior to the closing date of the submissions and this Board notes that Technoline Limited did not avail themselves of such remedy. In this regard, this Board does not uphold the Appellants’ first contention.**

## **2. The correction of Servotest Testing Systems Limited’s price**

**With regard to the Appellants’ second contention; this Board has examined the documentation relating to this particular issue and can confirm that the financial offer included optional items, which were not**

requested in the Tender Dossier. In this respect, quite appropriately, the Evaluation Committee, to compare bids on a “*like with like*” basis, requested the Bidder to confirm the price without these optional items. In this regard, a clarification was requested to confirm the actual final price, which consisted of the equipment and service level agreement excluding the power supply. This Board has also noted that Servotest Testing Systems Limited confirmed that the actual final price should read € 475,000.

One of the principles of Public Procurement Regulation is to treat all the Bidders on the same level playing field and in this particular case, it was necessary and obligatory, on the part of the Evaluation Committee to bring the Preferred Bidder’s offer in line and on the same level with the other Bids so as to compare on a “*like with like*” basis. In this regard, this Board confirms that the correction of the total sum was carried out in accordance with the Public Procurement Regulations and the Evaluation Committee acted in a fair, just and transparent manner. In this respect, this Board does not uphold the Appellants’ second contention.

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

- i) does not uphold the contentions made by Technoline Limited;**
- ii) upholds the University 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 Carmel Esposito  
Member

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