

informed Appellants that their offer had been disqualified as, albeit their offer was the cheapest, they had failed to provide what was requested.

Dr Clement Mifsud Bonnici said that this disqualification relates to the general principles of the Public Procurement Regulations, namely proportionality and equal treatment. The tender made it clear that technical literature had to be provided to support compliance, but the literature supplied by Appellant was generic. A clarification note was raised to ascertain compliance but there was no change in the re-submissions by Appellant. The Contracting Authority would be discriminating if it accepted standard technical literature which showed different details to what was requested.

All that the Authority requested was literature that matched the product and since this was not forth coming they were forced to exclude the Appellants' bid. If the former had accepted the statement that the manufacturers could customise the product it would have been unfair to other bidders who had complied with the requirements. The opportunity to rectify their submissions had been missed by the Appellants. There had been the opportunity of seeking a precontractual remedy if things had not been clear prior to tendering.

The Chairman reminded the Appellants that the Authority was entitled to ask for specific literature as necessary to ensure compliance with tender terms. Even the opportunity provided by a clarification had not been met.

Mr Calleja said that his firm had been discriminated against as he had replied to all the questions in the tender form correctly. The technical tender literature submitted was the standard one for the product and the Contracting Authority should not expect specific literature over and above what had been submitted.

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

This Board,

having noted this Objection filed by Calleja Limited (herein after referred to as the Appellants) on 23 January 2019, refers to the claims made by the same Appellants with regard to the Tender of Reference TD/T/4120/PC3/2018 listed as Case No 1284 in the records of the Public Contracts Review Board, and

awarded by Enemalta plc (herein after referred to as the Contracting Authority).

Appearing for the Appellants:

Mr Stephen Calleja

Appearing for the Contracting Authority:

Dr Clement Mifsud Bonnici

Whereby, the Appellants contend that:

- a) their main concern refers to the fact that, the reason why their offer was rejected, was due to the alleged claim that the literature so submitted, did not specifically indicate the product being offered. In this respect, the Appellants insist that the statement made by the manufacturers, in that, they can custom fabricate, was ignored by the Contracting Authority, apart from the fact that, the Appellants declared that they will conform with the technical specifications stipulated in the Tender Document.**

This Board has also noted the Contracting Authority's 'Letter of Reply' dated 4 February 2019 and its verbal submissions during the Public Hearing held on 20 March 2019, in that:

a) Enemalta plc maintains that the technical literature had to supplement and support the compliance of the product being offered by the Appellants. In this respect, the Appellants submitted generic literature which did not indicate their offer and even so, in the reply to the clarification request, they failed to provide details to indicate their product.

This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, opines that the issues that merit consideration are twofold namely; literature submitted by Calleja Limited and clarification submitted by Enemalta plc.

1. Literature submitted by Calleja Limited

a) This Board would respectfully point out that, when the Contracting Authority requests technical literature, the latter documentation should not only supplement the details of the product being offered by the Bidder, but such literature should illustrate exactly the same product on offer. One has to acknowledge that, the Bidder, in his technical offer, describes the technical feature of his product so that the manufacturers' literature will further support and illustrate the Bidder's technical declaration. In this respect, this Board would emphasize the importance that, when technical literature is

requested, this should illustrate the product with all its technical specifications to confirm and conform with the Bidder's technical offer, so that the literature will form part of the technical offer;

- b) In this particular case, the technical literature was requested, however, Appellants submitted generic rather than specific literature of the product being offered, so that, quite appropriately, the Evaluation Committee could not identify the Appellants' proposed product, from the generic literature submitted by the latter.
- c) This Board takes into consideration the fact that the Appellants' were given the opportunity, by the Contracting Authority, to rectify the situation, however, through the reply to the clarification request, Calleja Limited, yet again, failed to produce/submit literature which supported and illustrated the product being offered.
- d) This Board also considered the manufacturers' note which stated that:

Remark: This is our standard literature used for worldwide customers but we make specific and customise products as per customer's requirement drawings/technical data sheet with the help of our expertise engineers"

The above remark does not, in any way whatsoever, substitute what was being requested by Enemalta plc, as the Tender Document requested literature of the particular product.

In this regard, this Board does not uphold the contention made by Calleja plc.

2. Clarification submitted by Enemalta plc

- a) The Evaluation Committee, quite correctly and in accordance with Note 7 (2b), requested the Appellants to rectify his offer with regards to the Literature, which had to match the product being offered, however, through the reply to the clarification/rectification request, Calleja Limited's offer position remained the same.**
- b) In this particular case and in accordance with the remedy provided by article 2b, Appellants were given the remedy to submit specific literature of their product, yet still no such documentation was submitted.**
- c) On numerous occasions, this Board has noted that, if in doubt about a particular item or condition stipulated in a Tender Document, Appellants had all the remedies available prior to the submission of their offer and this Board notes that such opportunities were not availed of by the Appellants.**

In conclusion, this Board opines that:

- a) Calleja Limited failed to provide the technical literature of the product being offered;**

- b) the Appellants were given the opportunity to rectify such deficiency, yet, in their reply to the clarification request, they failed to provide what the Tender Document had dictated;**
- c) the Evaluation Committee complied with the principle of proportionality and equal treatment in their evaluation process.**

In view of the above, this Board,

- i) does not uphold the contentions made by Calleja Limited;**
- ii) upholds Enemalta plc's decision in the award of the Tender;**
- iii) confirms that the evaluation process was carried out in a just, fair and transparent manner;**
- iv) directs that the deposit paid by the Appellants should not be refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

28^h March 2019