

PUBLIC CONTRACTS REVIEW BOARD

Case 1316 – CT 2318/2018 – Tender for the Provision of Fifteen (15) Brand New Low Emission Vehicles in two Lots: Lot 1 – Four (4) Passenger Vehicles and Lot 2 – Eleven (11) Wheelchair Accessible Vehicles for Agenzija Sapport

Remedy before Closing Date of a Call for Competition

The publication date of the call for tenders was the 28th March 2019 whilst the closing date was 30th April 2019. The estimated value of the tender (exclusive of VAT) was € 377,000.

On the 23rd April 2019 Michael Attard Imports Ltd sought a Remedy against Agenzija Sapport as the Contracting Authority demanding a review of the latter's decision as it prejudiced Appellants' ability to participate in the tender.

On 28th May 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Michael Attard Imports Ltd

Dr Reuben Farrugia	Legal Representative
Mr Adrian Scicluna Calleja	Representative

Contracting Authority – Agenzija Sapport

Dr Rita Mifsud	Legal Representative
Mr Gian Farrugia	Representative
Ms Stephanie Etim Grech	Representative
Ms Adreana Sammut	Representative

Department of Contracts

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

Dr Reuben Farrugia Legal Representative of Michael Attard Imports Ltd made a preliminary submission wherein he regretted the Contracting Authority inference in the ability of the Public

Contracts Review Board to deal with this Case. The Authority's approach was too formal as Regulation 262 was not exhaustive and possible of a wide interpretation. Dealing then with the grievance which led to this call for a remedy he sought to request a witness to indicate the depth of the claimed extensive research carried out in the formulation of this tender.

Mr Gian Farrugia (217087M) called as a witness by the Appellant testified on oath that he was a Senior Executive at Agenzija Sapport. He stated that no written report had been prepared on the research carried out – they had researched on line for their requirements.

Questioned by Dr Farrugia witness stated that the Agenzija required seven (7) seater vans and wheelchair accessible vehicles. Market availability indicated that such vehicles were not easy to locate locally and they had extended the research to firms abroad. The tender had been formulated on their requirements following their research from which it resulted that there were three brands of vehicles available locally – Peugeot, Citroen and Fiat. A document was tabled (Doc 1) showing details of these three vehicles. At about the time that the tender was issued there was a change in the engine capacity of the Peugeot and Citroen vehicles - down to 1499cc – this meant that only the Fiat Dublo now met the tender specifications that the vehicle engine capacity had to exceed 1500cc.

In answer to further questions witness said that he was not aware that it was no longer possible to register vehicles with Euro V engines but he agreed that engines with a capacity of 1499cc tended to give lower emissions and better fuel efficiency.

Dr Farrugia said that it was patently obvious that this tender was anti-competitive. The Authority had no choice in the selection of vehicles as only one brand met their specifications. Article 18 of the European Directive had been revised in January 2019 and had dealt precisely with the broadening of the interpretation of the terms of competition.

Dr Rita Mifsud Legal Representative of Agenzija Sapport said that the legal process must be adhered to. The Authority felt that it was correct to stick to the terms of the tender in the clarification which is meant to clarify not to change the terms. It is beyond the terms of the PCRБ to change the terms of the tender.

Dr Farrugia said that the remedy Appellants were seeking conforms to the Procurement Regulations – they were not seeking a change of specifications – they sought a simple clarification to equate 1499cc to 1500cc in the tender specifications.

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

This Board,

having noted this ‘Call for Remedy Prior to the Closing Date of a Call for Competition’ filed by Michael Attard Importers Limited (herein after referred to as the Appellants) on 23 April 2019, refers to the claims made by the same Appellants with regard to the tender of reference CT 2318/2018, listed as case no 1316 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr Reuben Farrugia

Appearing for the Contracting Authority: Dr Rita Mifsud

Whereby, the Appellants contend that:

- a) their main concern refers to the fact that, the Authority requested vehicles with an engine capacity ranging from 1500cc to 1800cc and in this respect, Appellants insist that such dictated specifications limit completely the scope of competition, as there is only one Supplier who can offer the minimum capacity of 1500cc engine capacity, so that same Appellants contend that the minimum capacity of engines should be 1499cc, as such capacity of engines is more efficient and will enable more participation of prospective Bidders.**

This Board also noted the Contracting Authority’s ‘Letter of Reply’ dated 3 May 2019 and its verbal submissions during the hearing held on 28 May 2019, in that:

- a) the Authority contends that such specifications relating to the range of capacity being requested, were based on market research and availability of engine capacity at the time of publication of the tender, so that, if there were changes to the availability of new engine capacity, the latter were obviously not taken into consideration.**

This same Board also noted the testimony of the witness namely, Mr Gian Farrugia – Senior Executive – Agenzija Support duly summoned by the Public Contracts Review Board.

This Board has also taken note of the documents submitted by Agenzija Support which consisted of leaflets of three available vehicles.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the Parties concerned, including the testimony

of the witness duly summoned opines that, the issue that merits consideration is the factor relating to the dictated minimum engine capacity of 1500cc.

- 1. From the submissions made by both Parties to this appeal, this Board has been made aware that, at present, due to changes in the capacity of motor engines, the way the technical specifications were formulated, there exist only one Supplier that can meet such requirements and such a situation does, in fact, limit the scope of competition, even though, at the time of publication of the tender, such recent changes were obviously not in force. At the same instance, this Board noted that the Authority is in agreement with the fact that engines of capacity 1499cc, give lower emissions and better fuel efficiency.**
- 2. It is important to point out that the technical specifications of a tender represent the core of an offer so that, such specifications should be formulated in such a manner as to allow, as much Participants as possible, which in the end would be to benefit of the Contracting Authority. In this particular case, the dictated minimum capacity of the engine of 1500cc did deter prospective Bidders from participating and this Board was also informed that engines, today denotes as having a capacity of 1499cc, are more efficient.**

3. This Board also noted that the Authority acknowledges the fact that, in view of recent developments, the specifications are now somewhat outdated and in this regard, this Board opines that, the Authority, through a clarification note, inform prospective Bidders that the range of engine capacity should be substituted to read, 149cc to 1800cc.

In view of the above, this Board,

i) Upholds Appellants' contentions,

ii) directs that the Authority issue a clarification note adjusting the range of engine capacity as duly stated above.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

5 June 2019