

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1392 – CT 2403/2018 – Tender for the Removal of Old Navigational Buoys, Supply, Installation and Commissioning of New Buoys**

The publication date of the tender was the 15th May 2019 whilst the closing date was the 18<sup>th</sup> June 2019. The estimated value of the tender (exclusive of VAT) was € 450,000.

On the 1<sup>st</sup> November 2019 E.C. Municipals Ltd filed an appeal against Transport Malta as the Contracting Authority on the grounds that their bid was disqualified as it was considered to be administratively non-compliant. A deposit of € 2,250 was paid.

There were two (2) bidders.

On 28<sup>th</sup> November 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – E.C. Municipals Ltd**

Dr Jan Karl Farrugia	Legal Representative
Mr Alex Fenech	Representative

#### **Recommended Bidder – Boat Maintenance Ltd**

Dr Clement Mifsud Bonnici	Legal Representative
Mr Benjamin Sammut	Representative
Mr David Sammut	Representative

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

Dr Franco Galea	Legal Representative
Dr Lucio Sciriha	Legal Representative
Mr Patrick Pollacco	Chairperson Evaluation Committee
Mr Rudolph Muscat	Member Evaluation Committee
Mr Roderick Abdilla	Member Evaluation Committee
Mr Johan Camilleri	Member Evaluation Committee
Ms Liz Markham	Representative

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

Dr Jan Karl Farrugia Legal Representative for E.C. Municipals Ltd said that this appeal turns on the alleged lack of the ESPD document in Appellants' submissions. This followed a series of events commencing from the evaluation committee requesting the submission of an ESPD through a clarification notice, followed by the Appellant being notified that they were awarded the contract, through a subsequent letter inexplicably withdrawing the award and being disqualified as being administratively not compliant. The ESPD had been uploaded twice and an automatic response received and this will be confirmed by the testimony of the witness who handled the tender submission.

Dr Franco Galea Legal Representative for Transport Malta stated that the Director of Contracts had confirmed to the Contracting Authority that the requested documents (ESPD) had not been uploaded. The Appellants uploaded documents other than the ESPD, and therefore the Authority requested rectification but again the required document was not found by the Department of Contracts when they started preparing the contract documents. The offer to Appellants was therefore withdrawn which fact did not benefit the Authority since both offers were technically correct but Appellants' bid was cheaper.

Mr Matthew Borg (10190M) called as a witness by Appellants testified on oath that he is the accountant of the Appellants' firm and was responsible for preparing the tender. He confirmed that the first document he uploaded was the Selection Criteria Declaration Form (tabled as Doc 1) in lieu of the ESPD. After the requested clarification he uploaded the ESPD (tabled as Doc 2) receipt of which was electronically confirmed. In reply to a question he confirmed that the automatic reply does not indicate what attachments were submitted.

Mr Jason Grech (185071M) called as a witness by the Public Contracts Review Board testified on oath that he was an Assistant Director at the Department of Contracts and was responsible for the procurement IT system. He stated that he had checked the response to the 25<sup>th</sup> June 2019 clarification and confirmed that there was no document attached. He tabled the Evaluation Clarification Report (tabled as Doc 3) which clearly indicates that there was no document attached. He had further verified this fact through a query with the system developers who confirmed twice that no attachments were included.

Questioned by Dr Farrugia witness stated that the developers who own the system are an outside independent firm and he found them extremely reliable.

Dr Farrugia said that unless a technical report from the system developers was produced the evidence heard so far was not convincing.

Dr Clement Mifsud Bonnici Legal Representative for Boat Maintenance Ltd said that the normal practice is to rely on the evidence of the Department of Contracts. Assurance had been given that the Authority had checked and checked again and this should suffice.

Dr Farrugia wished it to be recorded verbatim “that he objects in the name of his clients that in view of the evidence heard from the Assistant Director Mr Grech he requests that the system developer is requested to give evidence regarding the system referred to by witness as name of developer is still not known by Objector up to now.”

Dr Galea wished it to be recorded verbatim “that on behalf of Transport Malta there is no point in Appellants request since witness produced Mr Jason Grech confirmed on oath that his testimony was regarding verifications carried out by himself on the system and as regards the external developer this was consulted by said witness who verified the results of his own verifications.”

Dr Mifsud Bonnici wished it to be recorded verbatim “that he agreed with the submissions made by Dr Franco Galea. He further submits that Appellants’ demands cannot be put forward at this stage because his evidential stage was closed. Dr Mifsud Bonnici further submits that the identity of the system developer is public knowledge on the EPPS website and the name is European Dynamics. He further submits that it was for the Appellants to summon the witness in advance.”

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

End of Minutes

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## **Decision**

**This Board,**

**having noted this objection filed by E.C. Municipals Ltd (herein after referred to as the Appellants) on 1 November 2019, refers to the claims made by the same Appellants with regard to the tender of reference CT 2403/2018 listed as case No. 1392 in the records of the Public Contracts Review Board, awarded by Transport Malta (herein after referred to as the Contracting Authority).**

**Appearing for the Appellants:**

**Dr Jan Karl Farrugia**

**Appearing for the Contracting Authority: Dr Franco Galea**

**Dr Lucio Sciriha**

**Whereby, the Appellants contend that:**

- a) **Their offer was deemed administratively non-compliant, due to the alleged fact that the Authority did not receive the ESPD form. In this regard, Appellants insist that, they had factually submitted the ESPD form in their original submissions and also in reply to the clarification request.**

**This Board also noted the Contracting Authority's 'Letter of Reply' dated 8 November 2019 and its verbal submissions during the hearing held on 28 November 2019, in that:**

- a) **The Authority maintains that Appellants' ESPD form had not been uploaded in their original submissions, so that the Authority requested clarification from Appellants and asked to resubmit this missing documentation. In this regard, Appellants did not submit the requested**

**documentation in reply to the clarification note dated 21 June 2019, so that Appellants' offer was deemed administratively non-compliant.**

**This same Board also noted the testimony of the witnesses namely:**

**Mr Matthew Borg, duly summoned by E.C. Municipals Ltd**

**Mr Jason Grech, duly summoned by the Public Contracts Review Board.**

**This Board has also taken note of the documents submitted by E.C. Municipals Ltd which consisted of:**

**Doc No. 1: Selection Criteria Declaration Form**

**Doc No. 2: Electronic Receipt of ESPD**

**And by the Contracting Authority which consisted of:**

**Doc No. 3: Evaluation Clarification Report**

**This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony of the witnesses duly summoned opines that, the issue that merits consideration is the Appellants' alleged submission of the ESPD form.**

- 1. First and foremost, this Board would point out that the European Single Procurement Document (ESPD) forms the core of the bidder's submissions and on which the Evaluation Committee carries out its deliberations. The details contained in the ESPD represent a summarised declaration of whether the bidder is capable of executing the tendered works or services and in the case of supply, the type of product he is offering to provide under the terms and conditions as stipulated in the tender document. The important role and objective for the submission of the ESPD cannot be more strongly emphasized.**
  
- 2. In this particular case, Appellants maintain that they had submitted the ESPD in the first instance, whilst the Authority can confirm that no such documentation was ever received at its end. In this regard, this Board examined all the documentation submitted by Appellants, in their offer and could not find any trace of an ESPD in the Appellants' original submission.**
  
- 3. At the same instance, this Board noted the credible testimony given by the witness namely, Mr Jason Grech who confirmed that after checking with the developer of provider of the IT system, the latter confirmed the fact that, the receipt indicates that the bidder replied but did not upload**

**the ESPD, so that the requested documentation (ESPD) was not received by the Authority.**

**4. This Board heard and treated similar cases where the system was being challenged and respectfully, would point out that whenever such claims were presented, claimants could not prove that what had been allegedly submitted was received at the other end, by the Authority.**

**5. With regard to Appellants' declaration in that such statement of verification from the systems developer should be in form of a written report, this Board would point out that, the evidence given by the witness was credible whilst, at the same instance, this Board could not trace an ESPD from Appellants' submissions.**

**In conclusion, this Board opines that:**

- a) The electronic receipt presented by Appellants does not indicate that the specific ESPD form had been received by the Authority.**
- b) The verification by the system provider that no attachments were included in Appellants' submissions is more than justifiable. In this**

**regard, this Board does not deem that a written report from the system provider is necessary.**

**c) Appellants did not present credible evidence to prove that the ESPD form was included in the submissions.**

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

- i. does not uphold Appellants' contentions,**
- ii. upholds the Contracting Authority's decision in the award of the contract,**
- iii. directs that the deposit paid by Appellants should not be refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Richard A Matrenza  
Member

*12 December 2019*