

PUBLIC CONTRACTS REVIEW BOARD

Case 1406 – CT 2196/2019 – Framework Contract for the Supply and Delivery of Marine Gas Oil DMA according to ISO 8217 to Gozo Channel (Operations) Ltd

The tender was published on the 29th August 2019 and the deadline for submissions was the 1st October 2019. The estimated value of the tender (exclusive of VAT) was € 9,283,260.

On the 11th November 2019 Cassar Fuel Ltd filed an appeal against Gozo Channel (Operations) Ltd as the Contracting Authority on being disqualified on the grounds that their bid was administratively non-compliant. A deposit of € 44,155 was paid.

There were two (2) bidders.

On 18th December 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 – Cassar Fuel Ltd

Dr Matthew Brincat	Legal Representative
Mr Mark Cassar	Representative
Mr Charlot Caruana	Representative

Recommended Bidder

Dr Francis Joseph Borg	Legal Representative
Mr Joseph Falzon	Representative

Contracting Authority – Gozo Channel (Operations) Ltd

Dr Georgine Schembri	Legal Representative
Mr John Muscat	Secretary Evaluation Committee
Mr Mario Saliba	Member Evaluation Committee
Ms Mary Ann Pace	Member Evaluation Committee

Department of Contracts

Dr Franco Agius	Legal Representative
-----------------	----------------------

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

Dr Matthew Brincat Legal Representative of Cassar Fuel Ltd said that bidders had the option to either deliver the bid bond by hand or by post - there were no qualifications if one chose the latter method. There is a certain lacuna in this requisite of the tender which the Public Contracts Review Board (PCRB) needs to look into to avoid repetition of this instance. It is a certain fact that the bid bond exists and the Contracting Authority has evidence of this in their hands and there is proof that the original bid bond was posted. The Bank confirmed that the duplicate copy is valid to fulfil the necessary requisite of the tender. Appellants had given five reasons in their letter of appeal to substantiate their claim.

Dr Franco Agius Legal Representative of the Department of Contracts stated that the tender established that the bid bond had to be delivered by hand or by post – Appellants opted for the risk of sending by post and the resulting lack of receipt was not the responsibility of the Contracting Authority. A trail of e-mails indicated the failure of Appellants to submit the bid bond. Within the Department the handling of bid bonds is carried out by different persons through a different process. Delivery by post cannot be excluded as at times they may be overseas entities who may wish to bid on tenders. It is up to the economic operator to choose the method of delivery with all the attendant risks. Reference was made to *Bezzina & Co vs The Director of Contracts* which was similar to this case.

The Chairman said that the Board would wish to hear evidence that the document was sent and that it was not received.

Dr Georgine Schembri Legal Representative of Gozo Channel (Operations) Ltd said that Appellants had to act in the best possible responsible way that follows a *'bonus pater familias'* standard of care.

Mr Charlot Caruana (422374M) called as a witness by the Appellants testified on oath that he confirms his affidavit filed with the letter of objection. His role in Appellants' business is to prepare all the tender documents, submit them through the EPPS and make sure documents are accepted. The bid bond was scanned and he received confirmation of receipt. Having elected to send the original bid bond by post he passed the letter on to Mr Philip Attard to post and mentioned that it was urgent. He subsequently checked that it had been posted.

Questioned by Dr Agius witness said that there was no specific reason why he had opted to send the bond by post – he had not thought of sending it by registered post.

Mr Philip Attard (388465M) called as a witness by Appellants testified on oath that he confirms his affidavit filed with the letter of objection. He stated that his employment with Appellants'

firm includes dealing with the post. Witness recalls being given a letter and told to ensure that it was posted that day and subsequently being asked to confirm that it had been posted. He had posted the letter in a post box next to his office and also recalls the name of Gozo Channel being mentioned.

In reply to a question by Dr Agius witness said that he did not know the contents of the letter nor to whom it was addressed; from memory he knew it was around the end of the month.

Mr Mark Cassar (540261M) called as a witness by the Appellants testified on oath that the Contracting Authority already had a bid bond in their hands and he wondered why he had to give them another one.

Mr Mark Mizzi (255374M) called as a witness by the Public Contracts Review Board testified on oath that he was the Pre-Contracts Assistant Director at the Department of Contracts. He confirmed the contents of a 10th October 2019 email he was referred to (Doc AC1) and the time it was sent as 11.43 hrs. Prior to sending the email he had not made any enquiries as to whether any bid bonds had been received as that was not his role. No clarification was sought by him as there were no problems referred to him by the evaluation committee. It is not the witness' function to verify bids submitted.

Ms Yvonne Psaila (301273M) called as a witness by the Public Contracts Review Board testified on oath that she works at the Department of Contracts. She stated that she is responsible for receiving the original bid bonds from the Customer Care department and from the Registry. Witness was referred to email dated 10th October 2019 at 14.02hrs (Doc AC2) which stated that witness had received only one bid bond from Falzon Fuel. Postal items received are handled by Registry employee Mr Joe Caruana who passes them on to witness. She was not made aware that there were any missing bid bonds. The wording of the email referred to above (Doc AC2) was standard and followed the set template.

Mr Joe Caruana (266568M) called as a witness by the Public Contracts Review Board testified on oath that he works in the Registry at the Department of Contracts. His work involves receiving, stamping, numbering and filing documents accordingly. Witness is responsible for opening letters containing bid bonds, stamping and numbering the bonds and passing them on to Ms Yvonne Psaila. He confirmed that in this particular instance the only bid bond delivered by hand was from Falzon Fuels on the 4th October and a receipt was issued dated the same day.

Questioned by Dr Brincat witness said that he does not recall receiving an envelope from Cassar Fuel and was not absent from work in the period 1st to the 11th October 2019. He was not asked by anyone about any bid bond.

The Chairman at this stage said that he wanted to establish that all parties agreed that the point at issue was that the bid bond had still not been received. Assent was signified.

Mr John Muscat (233582M) called as a witness by the Public Contracts Review Board testified on oath that he was the secretary of the evaluation committee. Referred to e-mail (Doc AC1) witness confirmed that when clarification was requested they were not aware that the bid bond from Cassar Fuel had not been received. Clarifications were issued before the DoC had replied.

Dr Brincat said that the merit of his clients' appeal is that the bid bond exists. The Board should consider why a bidder should be punished because an item of post went astray, and if necessary propose a review of the system. The Director of Contracts must be more precise in the tender requisites and it would be helpful to have a ruling for the future.

Dr Agius stated that the tender clearly offered alternative methods of submission of the bid bond (vide page 1). No guarantee is ever given to any bidder that they would win the tender and the risk is always on the bidder. In this case why did the bidder not deliver the bond by hand? All that was heard from witness Mr Attard was simply that he had posted an envelope but he did not know either the contents or the addressee. Reference was made to Court of Appeal case 312/2016 which dealt with a similar situation. In any case if this appeal was to be upheld the bids still had to be technically and financially evaluated. The basis of the tender was that the original bid bond had to be in place otherwise the bid had to be disqualified. There was evidence in the DoC files that the bid form from Falzon Fuel was received on the 4th October 2019.

In conclusion Dr Brincat said that the whole case hinged on an arbitrary decision that the bid bond was not received.

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

End of Minutes

Decision

This Board,

having noted this objection filed by Cassar Fuel Ltd (herein after referred to as the Appellants) on 11 November 2019, refers to the claims made by the same Appellants with regard to the tender of reference CT 2196/2019 listed as

case No. 1406 in the records of the Public Contracts Review Board awarded by Gozo Channel (Operations) Ltd (herein after referred to as the Contracting Authority).

Appearing for the Appellants: Dr Matthew Brincat

Appearing for the Contracting Authority: Dr Georgine Schembri

Whereby, the Appellants contend that:

- a) They had submitted the original Bid Bond by post and the Authority is alleging that such a document was not received at their end. In this regard, Appellants maintain that the Authority is fully aware that the bid bond exists and is operative, so that disqualification of their offer due to the alleged non-receipt of the original document is not proportionately justifiable.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 17 November 2019 and its verbal submissions during the hearing held on 18 December 2019, in that:

- a) The Authority insists that Appellants' original Bid Bond which was remitted by post, was never received at the Department of Contracts. In**

this regard, same Authority maintains that it was the responsibility of Appellants to ensure that such an important mandatory document arrives at the Department of Contracts, so that the Authority had no other option but to deem Appellants' offer not compliant.

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

Mr Charlot Caruana duly summoned by Cassar Fuel Ltd

Mr Philip Attard duly summoned by Cassar Fuel Ltd

Mr Mark Cassar duly summoned by Cassar Fuel Ltd

Mr Mark Mizzi duly summoned by the Public Contracts Review Board

Ms Yvonne Psaila duly summoned by the Public Contracts Review Board

Mr Joe Caruana duly summoned by the Public Contracts Review Board

Mr John Muscat 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 parties concerned, including the testimony of the various witnesses duly summoned opines that, the issue that merits consideration is the non-receipt of Appellants' Bid Bond at the Department of Contracts.

1. This Board would respectfully refer to the article 8 of ‘Instructions to Tenderers’ wherein it is clearly stated that:

“A scanned copy will be submitted through the ePPS as indicated in the Tender Response Format, followed by the submission of the original copy within five (5) working day from the closing date of tender, by post or by hand, to the Department of Contracts, Notre Dame Ravelin, Floriana, FRN 1600. In this case of a tenderer submitting an offer for one or more lots the tender guarantee, which is made out for the whole amount of the lots being tendered for, is to be uploaded in the space provided under each lot being tendered for in the Tender Response Format.

If the ORIGINAL Tender Guarantee (Bid Bond) is not submitted by the date and time indicated in Clause 2 above, the respective bid will be automatically disqualified.”

The tender document stipulates that the scanned copy of the Bid Bond submitted through the ePPS must be followed by the submission of the original. Furthermore, the same article dictates that if the original is not submitted within the specified period (5 working days from the closing date of tender), the offer will be automatically disqualified and in this particular case, it is being alleged that such document was never

received by the Department of Contracts whilst, at the same instance, Appellants maintain that they had submitted same through normal post.

2. This Board acknowledges the fact that Appellants, in their submissions, through the ePPS system, had included a scanned copy of the original Bid Bond. At the same instance, such an eventuality had to be followed by the submission of the original document by hand or by post. Appellants, in this respect, are maintaining that they had submitted the original document by normal mail. In the submissions made by the witness namely Mr Philip Attard, he stated that he recalled being instructed to post an important letter, however, he did not know the contents or to whom it was addressed.
3. This Board also took into consideration the testimony of the witnesses summoned by the Department of Contracts who attested that Appellants' original Bid Bond was never received by the Department.
4. This Board has always insisted on the adherence to the principle of self-limitation, in that, the Evaluation Committee must always adhere to

this principle as otherwise, equal treatment and transparency during evaluation process is not maintained. In this particular case, the tender document stipulated that the original Bid Bond must be submitted within 5 working days of the closing date of offers; however Appellants' original Bid Bond was not received at the Department of Contracts.

- 5. At the same instance, this Board would respectfully point out that, it was the duty and responsibility of Appellants to ensure that, such an important mandatory document arrives at or is delivered to the Department of Contracts within the stipulated period, as duly dictated in the tender document. From the testimony of the Appellants' witnesses, no tangible proof was presented to justify or prove that such an original Bid Bond was remitted to the Department of Contracts by ordinary mail.**

- 6. With regards to the importance of submission of the original Bid Bond, this Board would point out that the two main reasons as to why the tender dossier stipulated such a condition were:**
 - a) To confirm the veracity of the Bid Bond and**
 - b) For any eventual encashability, if the need arises**

7. With regard to Appellants' claim that, no mention of the missing original Bid Bond was made by the Authority in their clarification requests, this Board would point out that the clarification requests were made prior to the awareness of the non-receipt of Appellants' original Bid Bond.

8. This Board had also carried out the necessary investigation regarding the rubber stamp used by the customer care section of the Department of Contracts and can justifiably confirm that same rubber stamp has distinctly different dates denoting 4 December 2019 and 14 December 2019.

In conclusion, this Board opines that:

a) No tangible evidence was presented by Appellants to prove that the original Bid Bond was remitted by ordinary mail to the Department of Contracts.

- b) The submission of the original Bid Bond was a mandatory requirement and failure to remit same would render Appellants' offer non-compliant.**

- c) The responsibility to ensure that the original Bid Bond is delivered, whether by hand or by post, to the Department of Contracts, falls on the Appellants.**

- d) Where the tender document involves the submissions of Bid Bonds, this Board directs that, such submissions should be clearly stipulated to be effected either by registered mail or delivery by hand.**

In view of the above, this Board,

- i. does not uphold Appellants' contention,**

- ii. upholds the Contracting Authority's decision in the award of the tender,**

iii. directs that an amount of €40,000 from the deposit paid by Appellants be refunded.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

7 January 2020