

PUBLIC CONTRACTS REVIEW BOARD

Case 1461 – MGOZ MPU T 35/2020 – Tender for the Supply, Delivery, Installation, Testing and Commissioning of a CCTV Ticketing System and Electronic and IT Equipment including Energy Efficient Laptops, Monitors for the Xewkija Windmill

The tender was published on the 23rd April 2020 and the closing date of the tender was the 15th May 2020. The estimated value of the tender (exclusive of VAT) was € 26,774.58.

On the 22nd June 2020 Pointsys Ltd filed an appeal against the Ministry for Gozo as the Contracting Authority objecting to their disqualification on the grounds that their bid was financially non-compliant. A deposit of € 400 was paid.

There were two (2) bidders.

On 16th July 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Pointsys Ltd

Dr David Pollina	Legal Representative
Mr Pierre Sammut	Representative

Preferred Bidder – Tenovar Ltd

Mr David Falzon	Representative
-----------------	----------------

Contracting Authority – Ministry for Gozo

Dr Tatianne Scicluna Cassar	Legal Representative
Ms Christabelle Farrugia	Chairperson Evaluation Committee
Eng Mario Cauchi	Member Evaluation Committee
Mr Mario Saliba	Representative
Mr Marnol Sultana	Representative
Mr Chris Attard	Representative
Ms Liliana Curmi	Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties had agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr David Pollina Legal Representative for Pointsys Ltd said that the exclusion of Appellants due to a missing financial bid and for offering an alternative solution was improper. The missing Form (Form 2) did not apply in the least in this tender as there was no provision in the tender for day work as it dealt specifically with a project and all works were factored in the proposal. If there was doubt about Form 2 which had been submitted in blank form the Contracting Authority should have asked for clarification under Note 3. The extra form dealing with selection criteria which the Authority requested later did not appertain to this tender but to a previous one.

Dr Pollina said that alternative solutions were not accepted as the Authority was looking for a fixed price contract. However at a clarification meeting he was advised that alternative solutions were allowed and a subscription model as an alternative would not be objected to. The tender focused on the expected results from the solution and Appellants offer complies fully with the tender and exceeds the requirements. In real terms the cost of an annual licence on the alternative solution works out cheaper than the maintenance costs and the cost of the extra ticketing.

Dr Tatienne Scicluna Cassar Legal Representative for the Ministry for Gozo said that on Lot 1 of the tender Appellants were technically and administratively compliant but failed on the financial submissions. Tender on page 13 stipulates that BOQ Bill No 2 requires to be submitted for Day Work Rates and this was clear from the EPPs which indicated two forms. Appellants accept and admitted that BOQ from 2 was left blank which according to Note 3 could not be clarified or rectified. The missing form was required in case there was any unknown preparatory work to be undertaken and it was essential for the Authority to know at what rate this would be carried out. The scope of the clarification meeting was not intended to judge if alternative solutions could be accepted but was solely limited to the terms of the tender. The solution proposed by Appellants would oblige the Authority to pay a yearly licence fee and such an option was not available under the terms of the tender. Standalone systems were already successfully in use and this is what was asked for.

Ms Christabelle Farrugia (998783M) called as a witness by the Public Contracts Review Board testified on oath that she was the Chairperson of the evaluation committee and confirmed that financially Appellants' bid was not compliant. The subscription figure for the first year was included in the figures submitted which included items like turnstiles and other costs. The solution submitted by the bidder met the requirements of the tender.

Engineer Mario Cauchi a member of the evaluation committee stated that what the tender requested was a standalone system without any further future costs or subscriptions.

The Chairman noted that some of the queries that seem to have arisen on the Appellants' part could easily have been ironed out in an application for a precontractual remedy.

Dr Pollina re-iterated that the missing form was submitted in blank and there was no missing information to rectify and exclusion on a blank piece of paper was not logical. The clarification meeting should have made it clear that alternative solutions were not acceptable.

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

Decision

This Board,

having noted this objection filed by Pointsys Ltd (hereinafter referred to as the Appellants) on 22nd June 2020, refers to the claims made by the same Appellants with regard to the tender of reference MGOZ/MPU/T/35/2020 listed as case No. 1461 in the records of the Public Contracts Review Board awarded by Ministry for Gozo (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants: Dr David Pollina

Appearing for the Contracting Authority: Dr Tatianne Scicluna Cassar

Appearing for the preferred bidder: Mr David Falzon

Whereby, the Appellants contend that:

- a) Their offer was unfairly rejected simply due to the fact that, they had not submitted the Bid Form 2 which, in any case, was not applicable for this type of tendered supplies.**
- b) The Authority did not accept alternative solutions which would render the same results as those stipulated in the tender dossier.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 1st July 2020 and its verbal submissions during the virtual hearing held on 16th July 2020, in that:

- a) The Authority insists that, Appellants failed to submit the complete BOQ Bill no. 2, which was a mandatory requirement so that, their Financial Bid was financially non-compliant.**
- b) The Authority also contends that, Appellants' offered system was accepted by the Authority at a clarification meeting, as it was a compliant technical solution, but same offer was failed during the financial evaluation process.**

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

Ms Christabelle Farrugia duly summoned by the Public Contracts Review Board.

This Board, after having examined the relevant documentation and heard submissions made by the parties concerned, including the testimony of the witness opines that, the issues that merit consideration are two-fold namely:

- a) Appellants' financial bid form no. 2 and**
- b) Alternative solution offered by Appellants.**

a) Appellants' Financial Offer

- 1. Appellants contend that the alleged missing form did not apply to these tendered services as there was no provision for day week costs in the tender document and since such form related to these services, it was**

left blank and submitted in that format. In this respect, this Board would respectfully refer to page 13 of the tender document, which states that:

“The Contracting Authority requires the following items which are being split in three lots as follows:

- Lot 1 – CCTV & Ticketing System*
- Lot 2 – IT Equipment*

Lot 1 – CCTV & Ticketing System

<i>Reference</i>	<i>Description</i>
<i>BOQ Bill no.1</i>	<i>CCTV & Ticketing Systems Installations</i>
<i>BOQ Bill no.2</i>	<i>Day Work Rates (provisional)”</i>

2. The above article from section 3 of the tender document specifically dictates the submission and completion of BOQ Bill no. 1 and BOQ Bill no. 2. Appellants, in their submissions failed to complete Bill no. 2, which was to denote Appellants’ rates for any works which might be requested, and which are not provided for in the tender document. This Board acknowledges the importance for the Authority to be aware of such rates for such additional services which might occur during the tender period, so that, prior knowledge of appellants’ rate in this regard was

justifiably requested by the Authority and listed under Note 3, as mandatory requirements.

3. This Board would respectfully point out that, it is the responsibility of the bidders to adhere to the mandatory requirements and conditions duly stipulated in the tender dossier and not the Contracting Authority's obligation to justify its conditions and specifications., .
4. This Board cannot but mention the fact that, Appellants' decided to submit a blank BOQ Bill no. 2 as they concluded that such a mandatory document did not apply for this particular tender. In this regard, this Board would also point out that, the bidders are not to assume or decide what the Authority requires but must strictly adhere to what has been stipulated in the tender document.
5. This Board would also point out that, if Appellants were in doubt as to whether the BOQ Bill no. 2 should be completed or not, they had the opportunity to clarify or file a 'Call for Remedy' prior to their submissions of the offer. In this respect, this Board notes that such remedies were not availed of by Appellants, so that, this Board does not uphold Appellants' first contention.

b) Alternative Solutions

6. Appellants are claiming that, the Authority was not accepting alternative solutions and in this respect, this Board would refer to a

clarification note wherein, the Authority confirmed that, alternative solutions are acceptable to the authority, provided that they meet all the technical requirements as duly dictated in the tender document.

- 7. Regarding this issue, this Board would confirm that, the Authority not only accepted Appellants' solution but also deemed same as technically compliant and in this respect, this Board does not uphold Appellants' second contention.**

In conclusion, this Board opines that,

- a) The BOQ Bill no. 2 was justifiably requested by the Authority and was a mandatory financial requisite of the tender dossier.**
- b) Appellants failed to submit a completed BOQ Bill no. 2 as duly requested in the tender dossier.**
- c) It was the duty and obligation of Appellants to abide by the conditions stipulated in the tender document.**
- d) Appellants had the remedies to clarify any misunderstanding on any of the clauses contained in the tender documents and this Board noted that, these remedies were not availed of by Appellants prior to the submission of their offer.**
- e) Appellants' financial offer was incomplete and was justifiably deemed as financially non-compliant by the Authority.**

f) With regard to Appellants' second contention, this Board credibly confirms that the Appellants' alternative solution was accepted by the Authority and deemed technically compliant.

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 tender,**
- iii. directs that the deposit paid by Appellants should not be refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

23rd July 2020