

PUBLIC CONTRACTS REVIEW BOARD

Case 1495 – SPM 05-20. Tender for the Manufacturing, Supply and Installation of New Timber/Metal Doors and Windows at the Offices at Level 2, Bugeia Institute, St Joseph High Road, St Venera

The tender was published on the 25th March 2020 and the closing date of the tender was the 28th April 2020. The estimated value of the tender (exclusive of VAT) was € 24,220

On the 14th September 2020 Project Technik Ltd filed an appeal against Social Projects Management Ltd as the Contracting Authority objecting to their disqualification on the grounds that their bid was not technically compliant and to the subsequent cancellation of the tender.

A deposit of € 400 was paid.

There were three (3) bidders.

On 28th September 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Project Technik Ltd

Dr Carl Grech	Legal Representative
Arch Alain Frendo	Representative
Mr Kurt Abela	Representative

Contracting Authority – Social Projects Management Ltd

Dr Ivan Gatt	Legal Representative
Mr Simon Dimech	Member Evaluation Committee
Mr Anthony Muscat	Representative
Arch Jessica Sammut	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 agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Carl Grech Legal Representative for Project Technik Ltd stated that the appeal hinged on two linked grievances in that since Appellants' submissions met the requirements of the tender there was no need to cancel it. This was purely a failure on the part of the Director of Contracts to use the proportionality

principle in deciding the tender outcome. In specifications requirement 133.6.2 it was stipulated that the doors had to be rated for 60 minutes fire resistance plus ‘generally’ a thickness of 54 mm. The product offered by Appellants had the correct fire rating but offered a thickness of 53 instead of 54mm.

This offer still fulfilled the tender specifications as the use of the word ‘generally’ allows certain flexibility as long as the main requirement i.e. the fire rating was met. If the 54mm thickness was an absolute requirement then the word ‘generally’ would not have been used. The Contracting Authority had failed to apply the principle of self limitation. PCRB Case 1314 referred to the requirements in a technical specification and *inter alia* the decision stated that the objectives had to be clearly defined and achievable.

Since the tender specifications had been met it followed that it should not have been cancelled, which cancellation prejudices the Appellants as the offers are now in the public domain and they stood no chance of winning the tender if it was re-issued.

Dr Ivan Gatt Legal Representative for Social and Projects Managements Ltd said that Appellants had not been prejudiced as they also know the price offered by the other bidders – that is the concept of competition. The use of the word ‘generally’ is not meant for it to be used loosely and interpretatively. There were certain criteria in the tender and it was not up to bidders to decide which one of those criteria to use. The Contracting Authority was not prepared to compromise or waive the safety factor and hence the specifications were not indicative but compulsory. The quoted Case 1314 was not parallel to this Case.

Mr Simon Dimech (454790M) called as a witness by the Public Contracts Review Board testified on oath that he was an Evaluator in the tender adjudication. In reply to question from the Chairman he said that the primary objective of the tender was to have a safe environment and the door must meet the 60 minutes fire resistance requirement. The use of the word ‘generally’ did not mean that bidders had tolerance but he agreed that the main objective was fire prevention.

Architect Jessica Sammut (238286M) called as a witness by the Public Contracts Review Board testified on oath that she was the technical person who drafted the tender. Questioned by the Chairman witness said that the word ‘generally’ was used in a whole sentence and must be read *in toto* not in isolation.

Questioned by Dr Grech witness agreed that the sentence does not state ‘must be’ and that the word ‘generally’ had not been inserted in the text by chance. Witness agreed that it was essential for the doors to have a 60 minute fire resistance but stated that the 54mm specification could not be ignored as it also related to safety.

Witness at this stage raised an additional point regarding the fire certificate submitted by Appellants being out of date. The Chairman ruled that since this had not been mentioned in the rejection letter as a shortfall on the part of Appellants the Board will ignore any reference to it.

Dr Gatt stated that Appellants were picking on semantics. The Authority’s position was clear – the door has two concurrent requirements and both had to be met – this was a safety matter and not subject to interpretation.

Dr Grech said that it was wrong for the Authority to claim that they were not prejudicing the Appellant – they had submitted the lowest bid and the other two bidders now knew the limit of offers. Safety was not being compromised – the segregation of areas for 60 minutes was the safety factor and not the door thickness. Appellants were a responsible business entity which would not risk the safety of individuals. If as the Evaluation Committee now seems to be insisting the door requisites are concurrent why was this not stated in the tender?

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 project Technik Ltd (hereinafter referred to as the Appellants) on 14th September 2020, refers to the claims made by the same Appellants with regard to the tender of reference SPM 05/2020 listed as case No. 1495 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr Carl Grech

Appearing for the Contracting Authority: Dr Ivan Gatt

Whereby, the Appellants contend that:

- a) Their offer was compliant in all respects and satisfied the requirement as stipulated in article 133.6.2 of the technical offer. The thickness of the door, in their offer, was 53mm instead of 54mm. However, the door was rated for 60 minutes fire resistance, the latter feature being the prime objective of the tendered procurement.**

- b) The Evaluation Committee failed to apply the principle of proportionality and self-limitation and in this respect, since all the offers are now public and their offer is the cheapest, the Authority should not cancel the tender.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 22nd September 2020 and its verbal submissions during the virtual hearing held on 28th September 2020, in that:

- a) The Authority insists that for safety reasons, the stipulated thickness of the doors must be respected and adhered to by the bidders. At the same instance, the Authority maintains that, the word 'Generally' is not to be construed loosely so that, the thickness of door and its fire resistance factor must strictly be complied with.**
- b) Since no offer was compliant, the Authority had no other option but to cancel the tender.**

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

Mr Simon Dimech duly summoned by the Public Contracts Review Board

Architect Jessica Sammut 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

witnesses duly summoned opines that, the issues that merit consideration are two-fold namely:

a) Appellants' Submission

b) Cancellation of Tender

1. The main issue in this appeal is the 'Thickness' of the doors submitted by Appellants being 53mm instead of 54mm as denoted in article 133.6.2 of the technical specifications, as stated hereunder:

"133.6.2 FD60 Doors generally should not be less than 54mm in thickness"

2. Appellants claim revolves round the word 'Generally' in that, since such wording was stipulated, the actual dictated measurement of 54mm should not be taken as a fixed measure but rather a very reasonable approximation, so that the submitted measurement of 53mm should be deemed technically compliant.

3. This Board would respectfully refer to the above-mentioned technical article (133.6.2) and notes that the word 'Generally' as construed within the sentence itself, does infer that, "in most cases the thickness of the door is 54mm", which in very plain English means that, the offers should be based around such measurement with very reasonable tolerance. In this respect, this Board opines that a measurement of 53mm as against 54mm does reflect the sort of guideline given in article 133.6.2 of the technical specifications of the tender dossier.

4. This Board, as it has on so many occasions, would point out that, the technical specifications should be drawn up in a clear manner so as to depict the exact objectives of the Contracting Authority. In this particular case, the main objective of the Authority was to procure doors of a thickness of 54mm as a general measure but with a fire resistance factor of 60 minutes (1hour).

5. Appellants' offered doors do have a fire resistance factor of 60 minutes and the thickness of the doors being offered by same is 53mm, which is within the range of 54mm. On the other hand, this Board strongly opines that, if the Authority wanted the thickness of the doors to be strictly 54mm thick, article 133.6.2 should have read as follows:

“FD 60 doors should not be less than 54mm”

Or

“FD 60 doors should be of 54mm thickness”

6. The technical specifications of a tender should have practical relevance in determining the legacy of Public Procurement Procedure so that, such specifications must show the following features:

- Be precise in the manner they describe the requirements**
- Be easily understood by the prospective bidder**
- Have clearly defined, achievable and measurable objectives**
- Not give any advantage to any particular bidder**

- **Provide sufficient detailed information to allow potential bidders to submit realistic offers.**

In this particular case, this Board is not convinced that, article 133.6.2 of the technical specifications, reflected the above-mentioned considerations.

- 7. With regard to the cancellation of the tender, this Board would first and foremost point out that, it is the duty of the Evaluation Committee to endeavour to save an advantageous offer without breaching the basic principles of Public Procurement Regulations. At the same instance, this Board comfortably notes that, the principle of proportionality should be applied in this particular case.**
- 8. It is also a fact that all the offers are now made public and some form of prejudice will also be suffered by all the bidders, especially by the most advantageous offer.**
- 9. This Board considers also the fact that, the main objective of the Authority, under this particular specification was, to receive offers for doors having a fire resistance factor of 60 minutes which represent the safety feature of the door whilst, a 1mm difference in thickness would surely not make a difference to such a safety factor. At the same instance, this Board is not convinced that, the wording of article 133.6.2 denotes that, the door has to be not less than 54mm.**

In conclusion, this Board opines that:

- a) **The application of the word ‘Generally’ does not indicate a fixed and determined factor but rather ‘Around’ or ‘Near To’, so that a measurement of 53mm falls within a general measurement of 54mm.**
- b) **The Evaluation Committee, in this particular case, should have applied the principle of proportionality.**
- c) **It is the duty of the Evaluation Committee to save an advantageous offer, without breaching the basic principles of Public Procurement.**
- d) **The tender should not be cancelled.**

In view of the above, this Board,

- i. does not uphold the Contracting Authority’s decision to cancel the tender,**
- ii. directs the Authority to re-evaluate all the offers taking into consideration that, the main objective of clause 133.6.2 should reflect the fire resistance factor,**
- iii. Appellants’ offer to be reintegrated in the evaluation process,**
- iv. directs that the deposit paid by Appellants should be fully refunded.**

Dr Anthony Cassar
Chairman
1st October 2020

Dr Charles Cassar
Member

Mr Richard A Matrenza
Member