

PUBLIC CONTRACTS REVIEW BOARD

Case 1464 – TD/T/4142/PC3/2019 – Framework Agreement for the Supply of Piercing Connectors

The tender was published on the 27th February 2020 and the closing date of the tender was the 2nd April 2020. The estimated value of the tender (exclusive of VAT) was € 140,737.50.

On the 8th June 2020 Global Supplies Ltd filed an appeal against Enemalta plc as the Contracting Authority objecting to their disqualification on the grounds that their bid was technically non-compliant. A deposit of € 703.69 was paid.

There were four (4) bidders.

On 24th July 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Global Supplies Ltd

Dr Josette Grech	Legal Representative
Mr Robert Grech	Representative

Contracting Authority – Enemalta plc

Dr Clement Mifsud Bonnici	Legal Representative
Eng Ivan Bartolo	Chairperson Evaluation Committee

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 Josette Grech Legal Representative for Global Supplies Ltd stated that the Contracting Authority had disqualified Appellants as they claim that clauses 5.1 and 9.1 of the technical specifications of the tender were not met. The Technical Schedule clearly shows that Appellants' offer indicated that the correct product was offered. The evaluation committee decided that the technical literature did not match the offer as it referred only to A2 stainless steel fastening bolts. The committee's clarification request for literature was not restricted to the item in doubt and was not clear but too far ranging, and hence they had not practised self-limitation. To remove any doubts samples could have been asked for.

Dr Clement Mifsud Bonnici Legal Representative for Enemalta plc said that the Contracting Authority was bound by certain principles – the tender stated clearly the tensile strength of steel required but this information was missing in the technical literature and everything hinges on this point. In PCRB case

1284 it was made clear that the specifications must conform to the tender requirements whilst EJC Case 523/16 restricts the Contracting Authority's actions in the case of lack of information on similar lines. The technical offer is restricted by the wording in a tender which is decided by the Department of Contracts.

The Chairman pointed out the importance of technical literature conforming to the product to be supplied.

Mr Robert Grech Director of Global Supplies Ltd said that the evaluation committee should have asked for a clarification rather than instead asking for literature as this would have resolved the doubts very easily.

Dr Grech said that Case 1284 referred to earlier was different to the present case as in that instance the literature offered was generic and not specific to a product. In this instance the literature was very specific.

Dr Mifsud Bonnici concluded by stating that the Authority was only interested in ensuring that the right product was supplied and if the product offered would truly satisfy the tender requirements 100% there would be no problem on their part. Clarification was not sought as this was a case of missing information.

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 Global Supplies Ltd (hereinafter referred to as the Appellants) on 8th June 2020, refers to the claims made by the same Appellants with regard to the tender of reference TD/T/4142/PC3/2019 listed as case No. 1464 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr Josette Grech

Appearing for the Contracting Authority: Dr Clement Mifsud Bonnici

Whereby, the Appellants contend that:

- a) **Their main concern refers to the alleged claim by the Authority that, their offer was not compliant with clauses 5.1 and 9.1 of the technical specifications, which referred to the fastening bolt, associated nut and washer. In this regard, Appellants maintain that, the Evaluation Committee should have sought clarification or requested a sample so that, any doubt on this particular issue would have been resolved without the necessity to cancel the tender.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 17th June 2020 and its verbal submissions during the virtual hearing held on 24th July 2020, in that:

- a) **The Authority insists that, the Evaluation Committee had to abide by the principle of self-limitation. In this respect, the tender document requested, in a very clear manner, the tensile strength of steel and Appellants failed to provide the literature to prove that their product complies with clauses 5.1 and 9.1. It must be noted that, since these items fell under note 3, the Evaluation Committee had no other option but to reject Appellants' offer.**

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned opines that, the issue that merits consideration refers to the technical literature submitted by Appellants.

- 1. This appeal refers to the Appellants' offer being non-compliant with clauses 5.1 and 9.1 of the technical specifications which reads as follows:**

“5 Compliance Fastening Bolt, associated Nut and Washer
5.1 M Material: A2.70 Stainless Steel
9 Compliance Fastening Bolt, associated Nut and Washer
9.1 M Material: A2 Stainless Steel”

The above clauses clearly denote that tensile strength of the material being requested is A2.70 stainless steel.

2. Although Appellants, in their technical offer confirmed that the tensile strength of the bolt, nut and washer is A2.70 stainless steel, in the technical literature which was duly requested the following technical data sheet of the composition of the product, showed the following:

<i>Item</i>	<i>Item Name</i>	<i>Weight (kg)</i>	<i>Pcs.</i>	<i>Material</i>
01	<i>Stainless steel Bolt M8x70 with PA torque Limiter (Shear Head)</i>	0.031	1	<i>DIN 933 A2/Polyamide PA 6.6</i>
02	<i>Stainless steel Wide Flat Washer M8 DIN 9021</i>	0.0006	1	<i>DIN 9021 A2</i>
09	<i>Stainless steel Nut M8</i>	0.004	1	<i>DIN 934 A2”</i>

From the above submitted literature, it is evidently clear that, the bolt, nut and washer as requested in clauses 5.1 and 9.1 of the technical specifications, are being offered at a tensile strength of A2 and not as A2.70 as stipulated in the same clauses.

- 3. As has been emphasized, on numerous occasions by this Board, if and when technical literature is requested in a tender document, such documentation is not capriciously stipulated and such a requirement should not be taken lightly by the prospective bidder. The technical literature should give assurance to the Authority that, the product with the specific technical specifications as duly declared in the bidders' offer, can be supplied, is existing on the market and provides proof and assurance to the Authority that the bidders' product meets the requested technical specifications as duly declared in the technical offer.**
- 4. It must be pointed out that, the technical literature forms an integral part of the technical offers and such technical offers cannot be rectified. At the same instance, the Evaluation Committee are bound by the principle of self-limitation so that, they have to conduct the evaluation process in accordance with the technical requirements as stipulated in the tender dossier.**
- 5. With regards to Appellants' contention that, the Evaluation Committee, if in doubt, should have requested a sample to confirm that Appellants product is compliant with clause 5.1 and 9.1 of the technical specifications, this Board would respectfully point out the following:**
 - The Authority is not obliged to request a sample**
 - Appellants' offer contained the requested literature which the tender dossier requested**

- **The Evaluation Committee were bound to abide by the principle of self-limitation, whereby they were not allowed to alter or rectify an offer**
 - **On the other hand, the data sheet of the composition of the product did not confirm the tensile strength as stipulated in the bidders' technical offer.**
- 6. This Board would also respectfully point out that whilst, it is the duty of the Evaluation Committee to abide by the basic principle of transparency, level playing field and self-limitation, it is also the duty and obligation of the bidder to ensure that, prior to the submission of the offer, all the technical specifications and conditions as duly stipulated in the tender document, have been complied with.**

In conclusion, this Board opines that:

- a) **The technical literature constituted an integral part of the technical specifications duly stipulated by the Authority.**
- b) **Clause 5.1 and 9.1 of the technical specifications clearly denoted the tensile strength, which was a mandatory requirement.**
- c) **The request for the submission of the technical literature was truly justified.**
- d) **Appellants, in their technical literature did not confirm the tensile strength as declared in their technical offer.**

- e) **Since the technical specifications fall under note 3, the Evaluation Committee could not clarify or rectify the technical literature submitted by Appellants.**
- f) **The evaluation process was carried out in a fair and just manner, applying the basic principles of transparency, equal treatment and self-limitation.**
- g) **In the circumstances, the Authority has no other choice but to cancel the tender.**

In view of the above, this Board,

- i. **does not uphold Appellants' contentions,**
- ii. **upholds the Contracting Authority's decision in the cancellation of the tender,**
- iii. **in view of the fact that the tender is being cancelled, this Board directs that an amount of five hundred Euro (€500), from the deposit paid by Appellants, be refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

29th July 2020