

## **PUBLIC CONTRACTS REVIEW BOARD**

**MEDE/MPU/014/2020**

**Tender for the Supply of Stationary Items including environmentally friendly photocopy paper for Colleges and Schools within the Ministry for Education and Employment**

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**Case 1544**

**DATE:18<sup>th</sup> March 2021**

**This Board,**

Having noted the Appeal filed by Office Essentials Limited, (hereinafter referred to as the Appellant) and the contents of the correspondence sent by Dr Jan A Micallef on behalf of appellant and received by the Board on the 10<sup>th</sup> November 2020.

Having also noted that the Contracting Authority failed to file in a reply.

Having taken cognisance and evaluated the witnesses produced, all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties.

Having noted and evaluated the minutes of the Board sitting of the 9<sup>th</sup> March 2021 hereunder re-produced:

**Case 1544 – MEDE/MPU/014/2020 – Tender for the Supply of Stationery Items including Environmentally Friendly Photocopy Paper for Colleges and Schools within the Ministry for Education and Employment (now known as the Ministry for Education)**

The tender was published on the 21<sup>st</sup> August 2020 and the closing date was the 25<sup>th</sup> September 2020. The estimated value of the tender (exclusive of VAT) was €152,036.31.



Dr Jan Micallef, Legal Representative for Office Essentials Ltd, objected to the actions of the Authority since any objections on the tender process should have gone through the PCRБ and it is obvious that the procedures laid down had not been followed.

Mr Simon Farrugia (19468M) called as a witness by the PCRБ testified on oath that he was the Chairperson of the evaluation committee and explained that after the award decision had been communicated the committee was made aware that certain label sizes requested in the tender are not available so every bid was technically invalid and all tenderers were disqualified.

Dr Micallef submitted that contrary to what is alleged there is no irregularity on the part of the Appellants. If the wrong size labels had been asked for this does not affect the procedure and the Authority had not right to cancel the tender. In line with the principle of proportionality the Authority should have sought clarification not cancellation, more so, bearing in mind the value of the contested item compared to the overall value of the tender. Should the PCRБ agree to the cancellation of the tender on a minute item they would be creating a serious precedent on general procurement. The lack of transparency shown in dealing with behind the scenes objections is surprising.

Dr Micallef requested that the Board deems the tender cancellation invalid, confirms the award of the tender to Appellants and orders the refund the deposit paid.

Ms Mary Anne Borg a representative of the Ministry said that the tender could not be awarded unless all submissions were correct, to which Dr Micallef stated that this was a fresh point not included in the disqualification letter and therefore irregular.

The Chairman thanked the parties for their submissions and declared the hearing closed so that the Board will pass on to give a decision.

End of Minutes

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### **Hereby resolves:**

That it results from the acts of the Appeal that the estimated tender value is of EUR 152,036.31 for three years and the appellant was informed that he had been awarded the tender by correspondence dated 20<sup>th</sup> November 2020. Subsequently, by correspondence dated 30<sup>th</sup> November 2020, the same appellant was informed that the procurement procedure was being cancelled in line with Article 18.3(e) of the General Rules Governing Tenders (GRGT).

That this quoted provision of the GRGT states textually:

Cancellation may occur where:

There have been irregularities in the procedure, in particular where these have prevented fair competition.

That the 30<sup>th</sup> November 2020 letter than makes reference to item no. 96 – Label Stickers which was included in the tender document with incorrect technical specifications.

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That as witnessed by Mr Simon Farrugia on oath during the sitting of the 9<sup>th</sup> March 2021, *“after the award decision had been communicated the committee was made aware that certain label sizes requested in the tender are not available so every bid was technically invalid and all tenderers were disqualified”*.

That Raisa Carbott stated under oath during the same sitting that the decision to revoke the award and cancel the procedure was taken following the *“outside objection was received by e-mail on the 24th November 2020 from Smart Office Supplies who contended that a certain sized label requested in the tender did not exist”*.

That the appellant, through his legal counsel, objected to the fact that all this was done behind the appellant’s back and furthermore and more importantly, that the procedure adopted by the outsider (Smart Office Supplies) was completely irregular and not according to law, as same only had the option of filing an appeal before the PCRБ and not raising an objection with the contracting authority.

Furthermore, appellant contends that article 18.3(e) is inapplicable to the resulting matter, as there is no irregularity in the procedure, but only wrong specifications on one item out of many others. Appellant contends furthermore that if the assertion of the contracting authority were true, then it could have been rectified by a more moderate solution rather than cancelling the whole procedure. He claims that it is surreal that for an item worth EUR 13.35, the whole tender bid for the value of EUR102,000 is cancelled. Appellant stated further that not upholding this appeal will cause a grave and dangerous precedent sending the wrong message which could give rise to serious abuse.

Having noted the submissions made by the contracting authority's representative, namely that a tender could not be awarded unless all submissions were in order.

The Board considers that:

The correct way for Smart Office Supplies to file its objection was not by sending an email of objection to the contracting authority. The contracting authority should have been aware of this and it should have discarded the same email and, at most, informed and directed the said company so objecting to follow the correct procedure as per law.

Moreover, without prejudice to the above, Article 18(3)(e) invoked by the contracting authority, does not oblige the same authority to cancel the procedure but it only entitles the authority to do so. The article says “*may*” and not “*shall*”, and hence in taking a decision on the basis of this article, the contracting authority has the liberty of analysing further, (if ever there was reason to do so following the correct procedure), and consider in more detail on whether a procedure is to be cancelled or otherwise. For example, as the appellant states, the item in question (item no 96) has a total value of EUR 13.35. Put within the context of the total value of the tender of EUR 152,036.31, the item in question relates and accounts to 0.0087% of the total value of the tender.

This is being said within the context of the three main principles and pillars of public procurement rules and legislation, namely, transparency, equality and proportionality.

The Manual of Procedures states that “*Contracting Authorities may take into account the specificities of the services in question and shall ensure that the procedures are reasonable and proportionate* .....”. The contracting authority should, in the Board's view, exercise its discretion as above described within these parameters and apply these principles. The Board deems that the contracting authority did not apply the principle of proportionality within the context of the facts as they result, as it is obvious that application of this principle to the resultant facts should never lead a contracting authority to cancel a procedure,

The contracting authority should have found a far better and more proportionate remedy to the issue that arose rather than taking the extremely drastic measure of cancelling the procedure, given the circumstances of this case.

The Board,

Having evaluated all the above concludes and decides:

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- a) To annul the cancellation letter sent to the appellant by the contracting authority dated 30<sup>th</sup> November 2020, and
- b) To confirm the letter of the contracting authority of the 20<sup>th</sup> November 2020 as sent to the appellant, saving, the cancellation of item 96 from the tender document submitted by the appellant for the reasons submitted by the contracting authority.
- c) In view of the above considerations, the Board furthermore orders that the deposit paid by the appellant upon filing of this appeal should be refunded back to the same appellant.

**Ian Spiteri Bailey**  
Chair

**Dr Charles Cassar**  
Member

**Carmel Esposito**  
Member