

PUBLIC CONTRACTS REVIEW BOARD

Case 1676 – CT2036/2019 – Tender for the Manufacturing, Installation, Maintenance and Storage of Christmas Decorative Lighting – Lot 3

31st January 2022

The Board,

Having noted the letter of objection filed by Dr Rita Mifsud on behalf of Iuris Advocates acting for and on behalf of D Illumination Limited, (hereinafter referred to as the appellant) filed on the 15th November 2021;

Having also noted the letter of reply filed by Dr Francelle Saliba acting for the Ministry for Gozo (hereinafter referred to as the Contracting Authority) filed on the 26th November 2021;

Having also noted the letter of reply filed by Dr Jean Paul Grech on behalf of Dr Jean Paul Grech & Associates acting for the 2Ceemedia (hereinafter referred to as the Preferred Bidder) filed on the 29th November 2021;

Having heard and evaluated the testimony of the witness Mr Josef Azzopardi (Representative of D Illumination Limited) as summoned by Dr Rita Mifsud acting for D Illumination Limited;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 20th January 2022 hereunder-reproduced;

Minutes

Case 1676 – CT 2036/2019 – Tender for the Manufacturing, Installation, Maintenance and Storage of Christmas Decorative Lighting – LOT 3

The tender was issued on the 29th July 2020 and the closing date was the 15th October 2020. The value of the tender on Lot 3, excluding VAT, was € 213,500.

On the 15th November 2021 D Illuminations Ltd filed an appeal against the Ministry for Gozo as the Contracting Authority objecting to Lot 3 of the tender being awarded to a third party after they had withdrawn their offer.

A deposit of € 1,068 was paid.

There were two (2) bidders on this lot.

On the 20th January 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – D Illuminations Ltd

Dr Rita Mifsud	Legal Representative
Mr Josef Azzopardi	Representative

Contracting Authority – Ministry for Gozo

Dr Francelle Saliba	Legal Representative
Mr Roberto Curmi	Member Evaluation Committee
Ms Rosabelle Pavia	Member Evaluation Committee
Mr Jason Sultana	Representative
Mr Marnol Sultana	Representative
Mr John Xuereb	Representative

Preferred Bidder – 2ceemedia

Dr Jean Paul Grech	Legal Representative
Mr Jason Caruna Camenzuli	Representative

Mr Kenneth Swain 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 in line with Article 89 of the Public Procurement Regulations. He then invited submissions.

Dr Rita Mifsud Legal Representative for D Illuminations Ltd related the sequence of events leading to this appeal. A clarification note dated 10th August 2021 indicated that the service on Lots 1 and 3 was to be provided by Christmas 2021 when the evaluation had taken place in July 2021. Appellant at that stage decided that time was too short to meet the deadline and withdrew its offer. Subsequently a fresh tender was issued for the same service to be provided by Christmas 2021. On this second tender Appellant was informed that Lot 1 was cancelled and the Contracting Authority was not accepting the bid for Lot 3 as bidder had previously withdrawn his offer. If the Authority had made it clear that the conditions of the call had been changed then Appellant would not have withdrawn its offer.

Dr Francelle Saliba Legal Representative for the Ministry for Gozo stated that the bidder's action prejudiced the Authority by their action. However the Authority had no further legal responsibility towards the Appellant the minute the latter withdrew its offer. There were no changes in the second tender issued which was simply an interim measure. Appellant ignored to state that the first tender was issued by the Department of Contracts while the Ministry issued the second one. Appellant has no legal claim.

Dr Jean Paul Grech Legal Representative for 2ceemedia stated as a preliminary point that Appellant had no *locus standi* as it had withdrawn the offer and therefore was no longer

involved or participating and thus cannot appeal a decision in which they were not participants.

Reference was made to the letter of withdrawal stating that price increases altered the parameters – this did not make sense because those price increases would further accelerate in 2022.

The Chairman at this stage said that that the Board will consider the merits of the appeal and decide on the preliminary plea in due course unless the parties specifically wished otherwise.

There were no objections to this decision.

Mr Josef Azzopardi (233783M) called as a witness by Appellant testified on oath that the Authority's decision gave them only three months to complete the contract – too short a time to import materials besides the need for overtime working. These factors did not apply for completion of contract by Christmas 2022, so they decided to withdraw the offer for Christmas 2021. The fresh tender was for all lots (1 to 7) but should only have been for lots 1 and 3 which were the lots withdrawn and which were awarded to another bidder. Appellant was discriminated against through putting him under time pressure.

Questioned by Dr Saliba witness said that the decision to withdraw the bid was taken on his own and he had not expected the tender to be re-issued.

In reply to questions from Dr Grech, witness confirmed that he had submitted a letter of withdrawal of his bids on 4th August 2021 and that he had participated in the second tender. He had taken no inhibitory action to stop the second tender.

This was the only testimony.

Dr Mifsud said that juridical interest is open to anyone who may have an interest, real or potential, in a tender – once Appellant was part of the process it has an interest. The parameters of the tender were changed as the date of completion was vital to the contract. Other bidders were granted a facility not given to the Appellant who was thus prejudiced. The completion period was key to the decision and therefore there was lack of transparency in the way the process was carried out bearing in mind there was a nine months delay in adjudicating the tender.

Dr Grech noted that Mr Azzopardi's testimony varied from the letter of withdrawal of the offer in so far as he had introduced logistics and labour costs which were not in the letter. He had not made any attempt to inhibit the second tender and had in fact not only participated in it but was awarded two lots. He was now complaining that someone else was doing the job. The case was closed once the withdrawal letter was submitted.

Dr Saliba said that the appeal was based on Appellant having second thoughts and doubts after withdrawing his bids. The Authority found itself with its back to the wall in this situation. The arguments put forward should be ignored and the Board should confirm the award in the second tender.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 20th January 2022.

Having noted the objection filed by D Illumination Limited (hereinafter referred to as the Appellant) on 15th November 2021, refers to the claims made by the same Appellant with regards to the tender of reference CT2036/2019 listed as case No. 1676 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Rita Mifsud
Appearing for the Contracting Authority:	Dr Francelle Saliba
Appearing for the Preferred Bidder:	Dr Jean Paul Grech

Whereby, the Appellant contends that:

- a) It felt aggrieved by the letter received on 5th November 2021 from the Department of Contracts stating that Lot 3 was being awarded to another bidder and Lot 1 cancelled.
- b) The Contracting Authority changed the parameters of the tender without informing the Appellant company.
- c) When the Appellant company withdrew its offers for Lot 1 and Lot 3, it did it with a sense of responsibility since it would have been impossible to manufacture, install and operate the lighting in the year 2021. This would also have been impossible to other operators.
- d) Regulation 38(5) of the Public Procurement Regulations is clear in stating that when a clarification note is issued, it then forms part of the tender dossier.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 26th November 2021 and its verbal submission during the virtual hearing held on 20th January 2022, in that:

- a) The Appellant company had initially been awarded Lot 1 and Lot 3 of this tender. Later on, the Appellant company rescinded the award letter stating reasons of time-frames and increase in prices.
- b) When the Appellant company withdrew its offers, the Contracting Authority had no legal obligations to the Appellant company.
- c) In order to save this 'original' tender, the Contracting Authority decided to extend this tender to year 2022, while at the same time buying services, in the interim, through a departmental tender (SPD3/2021/065)

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 29th November 2021 and its verbal submission during the virtual hearing held on 20th January 2022, in that:

- a) **Preliminary Plea** – Given that it was the same Appellant company which decided to remove itself from this competitive process, it stands to reason that it does not form part of this process. Therefore, the Appellant does not have any *locus standi* to continue its participation into these proceedings.
- b) **Merits** – The issues mentioned by the Appellant company, i.e. increase in prices and short time-frame for product delivery (Christmas 2021) were common factors to all prospective bidders. The fact that offer got extended to year 2022 does not change the parameters of the tender process.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witness duly summoned will first deal with the Preliminary Plea of the Preferred Bidder.

- a) **Preliminary Plea** –
 - i. The Board refers to the facts of the case, namely a) Appellant had initially been awarded Lots 1 and 3 b) the Appellant rescinded this award and withdrew his offers through the letter dated 4th August 2021.
 - ii. The Board opines that even though the Appellant, out of his own free will, withdrew his offers, he still has *locus standi* and juridical interest in the proceedings of this case.
 - iii. The interest is proven through a number of facts which emerged during this tendering process. Examples would include a) the bids made by the Appellant on various lots, more specifically on Lot 3, being the subject matter of this appeal, b) the rejection letter

sent by the Department of Contracts to the Appellant on 5th November 2021 informing them of the right as provided by the Public Procurement Regulations of the possibility for appeal in front of this Board.

Therefore, this Board does not uphold this preliminary plea and will now consider the grievances of the Appellant as follows:

- a) The Board refers to the letter of 4th August 2021, written by the Appellant company and addressed to the Department of Contracts whereby the Appellant withdrew the offers in respect to Lots 1 and 3. The reasons stated for such a withdrawal are two-fold, namely the increase in prices of material and the short time frame within which it would be expected to deliver the services. This Board notes that the Appellant withdrew these offers out of his own free will.
- b) This Board can possibly understand the reasoning behind the time frames 'reason' as provided for the withdrawal, even though this does not impinge on what other prospective bidder are capable of offering, in this case 2Ceemedia. It could certainly be, that other prospective bidders have better / more efficient logistical arrangements to be able to deliver such manufacturing and installation of Christmas decorative lighting.
- c) However, this Board cannot possibly understand how the appellant is mentioning the issue of price increases, "*due to the lapse of the period of validity*", but then is feeling aggrieved that the Contracting Authority extended the offer for year 2022. The price issue will certainly be more acute as time goes by!
- d) This Board opines that the Contracting Authority was well within its rights when it extended the offer of this tender for the year 2022 after the withdrawal of offers by the Appellant and hence the logistical issues this created to the Contracting Authority. This extension and the publication of an 'interim measure' SPD3/2021/065 were within the boundaries of the Public Procurement Regulations.

Therefore, this Board does not uphold Appellant's grievances.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Ms Stephanie Scicluna Laiviera
Member