

PUBLIC CONTRACTS REVIEW BOARD

Case 1710 – CT 2302 / 2021 – Tender for the Construction of a New Football Pitch and Underground Carpark at Naxxar School Complex – Foundation for Tomorrow's Schools

28th April 2022

The Board,

Having noted the letter of objection filed by Dr Carl Grech on behalf of Fenech & Fenech Advocates acting for and on behalf of C & F Building Contractors Limited, (hereinafter referred to as the appellant) filed on the 18th February 2022;

Having also noted the letter of reply filed by Dr Matthew Paris acting for and on behalf of Foundation for Tomorrow's Schools (F'TS) (hereinafter referred to as the Contracting Authority) filed on the 25th February 2022;

Having heard and evaluated the testimony of the witness Perit Michaela Borg Francalanza (Consultant to C & F Building Contractors Limited) as summoned by Dr Carl Grech acting for C & F Building Contractors Limited;

Having taken cognisance and evaluated 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 26th April 2022 hereunder-reproduced;

Minutes

Case 1710 – CT 2302/2021 – Tender for the Construction of a new Football Pitch & Underground Car Park at Naxxar School Complex

The tender was issued on the 17th September 2021 and the closing date was the 7th October 2021. The value of the tender, excluding VAT, was € 11,800,000.

On the 18th February 2022 C&F Building Contractors Ltd filed an appeal against the Foundation for Tomorrow's Schools as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed to be not technically compliant.

A deposit of € 59,000 was paid.

There were six (6) bidders.

On the 26th April 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – C&F Building Contractors Ltd

Dr Carl Grech	Legal Representative
Mr Johann Farrugia	Representative
Mr George Grima	Representative

Contracting Authority – Foundation for Tomorrow’s Schools

Dr Matthew Paris	Legal Representative
Mr Franco Costa	Chairperson Evaluation Committee
Eng Melchisedech Zarb	Representative
Ms Alexia Sammut	Representative

Preferred Bidder – Bonnici Bros Services Ltd

Dr John L Gauci	Legal Representative
Mr Gilbert Bonnici	Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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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 Carl Grech Legal Representative for C&F Building Contractors Ltd said that the appeal turned on the failure by the Authority to seek rectification on the literature submitted on two products – membrane and polystyrene - offered in the bid. The Appellant’s grievance is based on the lack of proportionality in the failure of the Authority to consider that the change of literature of equivalent products was not a change in the technical offer. Technical literature falls under note 2 and can be rectified. The Technical offer falls under Note 3 and the details of the products in question were fully indicated and met the specifications. The tender also stated that equivalence of products was acceptable subject to meeting the specifications. Price was the only award criteria and the value of the two products in question represent 0.2% of the Eur 8 million bid.

It transpired that the technical data sheets specifications originally presented were not clear and were not accepted and hence clarification was sought demanding reply within five days. In the short interval available it was not possible to obtain these and the only option was to submit literature of different brands but which showed exactly the same equivalent technical

data but with different brand names. There were no changes to the technical offer form. Reference was made to PCRB Case 960 where the Board had decided, on a very similar case, that no advantage was gained in offering an alternative brand.

The possibility to change literature existed as it was a Note 2 item and Appellant was requesting the re-integration of its bid and the refund of the amount of deposit paid in excess of the statutory amount.

Dr Matthew Paris Legal Representative for the Foundation for Tomorrow's Schools said that the Authority agreed that the deposit overpayment should be refunded as well as with the submissions made by Appellant but he disagreed on the point of equivalence. The decision of the Case quoted, which went back to 2016 does not necessarily apply in 2022 since there have been changes in the law. Changes to the original submissions should not be allowed as has been indicated by the PCRB in several recent cases. Equivalence can be used as a camouflage for any mistakes made in the original submission and it has to be in the standard not the brand. Changing brand is changing the technical offer which is not allowed. The Evaluation Committee had no discretion but to exclude – this is not a matter of facts but of a point of law. This is not a case of equivalence but a change of submissions.

Dr John Gauci Legal Representative for Bonnici Bros Services Ltd stated that it was obvious that there has been a change of brand and therefore the technical offer has been changed with the resultant danger if this change was accepted.

Perit Michela Borg Francalanza (342587M) called as a witness by the Appellant testified on oath that when one referred to the technical data sheets it was clear that the brands specifications when compared were equivalent for both the polystyrene and the membrane products.

This concluded the testimony.

Dr Grech stated that whilst he accepted that there were changes in procurement law the overriding issue in this case was the principle of proportionality. The tender allowed changes in the technical literature - the products have not been changed and accepting them does not affect any of the other bidders and hence there was no change in the level playing field.

Dr Gauci said that there was no dispute on the facts – but there was a change in Appellant's offer and this should not be accepted.

Dr Paris concluded by saying that the claim that the products were equivalent remained unproven as the original documents were not made available. The principle of proportionality must not be abused and this was reinforced by the Court of Appeal which held that proportionality should only be used if doubts existed about the clarity of an offer. This was not the case here.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 26th April 2022.

Having noted the objection filed by C & F Building Contractors Limited (hereinafter referred to as the Appellant) on 18th February 2022, refers to the claims made by the same Appellant with regards to the tender of reference CT 2302/2021 listed as case No. 1710 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Carl Grech
Appearing for the Contracting Authority:	Dr Matthew Paris
Appearing for the Preferred Bidder:	Dr John L. Gauci

Whereby, the Appellant, in their Letter of Objection, contends that:

- a) The Rejection Letter stated:

“EO was requested to rectify the literature submitted and to submit missing Literature. The EC reviewed the submitted reply and concluded that the bidder is Technically Non-Compliant.

Justifications:

(1) Dimple Membrane: BoQ Bill 4 (Item No. 4.17, Spec 29) - EO changed Brand and Model from ‘Tekno Forma/ Dimpled’ to ‘Triton Systems/Platon P8 Membrane’ during the Rectification Request. The Technical Offer falls under Note 3 - No rectification shall be allowed. Only clarifications on the submitted information may be requested.

(2) Expanded Polystyrene: BoQ Bill 7 (Item No. 7.01, Spec 59) - EO changed brand and model from ‘Sundolitt/Expanded Polystyrene’ to ‘Bitmac’ during Rectification Request. The Technical Offer falls under Note 3 - No rectification shall be allowed. Only clarifications on the submitted information may be requested.”

The Appellant is appealing from this decision for the following reasons: It is not proportionate to consider that a change in literature would have resulted in a change in the technical offer when the new submissions were for equivalent, interchangeable items of the same standard.

- b) At the outset, when taking note of the principle of proportionality, reference is made to the judgment delivered by the Court of Appeal in the case in the names 'Cassar Petroleum Services Limited vs Gozo Channel Company Limited u d-Direttur General tad-Dipartiment tal-Kuntratti', decided on the 12th January 2015, wherein it was quoting the European Court of Justice on the principle of proportionality as a general principle of European Law, it held that a measure taken by an authority must be such that it can be used to achieve the intended goal and cannot go beyond that which is required to reach that aim:

“As regards the principle of proportionality, the Court has held that, in order to establish whether a provision of Community law complies with that principle, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it.” (ECJ, United Kingdom vs Council of the European Union, C84/94, 12th November 1996, para 57)

The Court of Appeal continued:

“15. Għalkemm din is-silta hija dwar legislazzjoni, tgħodd ukoll għal miżuri ta' implimentazzjoni u decizjonijiet mehuda tahtbom. Din il-Qorti għalhekk tagħraf illi għandha qabel xejn tara x 'inbu l-għan ewlieni għas-sejba għal offeriti għax ma' dan għandha titkejjel il-proporzjonalita' tal-miżur mehuda biex jinkiseb. Fil-każ tallum l-għan ewlieni kien illi Gozo Channel tixtri n-nafta bl-orbos preżż.

16. Ma humiex sejr in jinkisru l-principju tal-trattament ugwali, il-principju ta' bla diskriminazzjoni, il-principju ta' għarfien reciproku u l-principju tat-trasparenza jekk, bla ma jinbidlu l-kondizzjonijiet tal-offerta nfisha, jingħata żmien biex jingieb document illi forsi, bi żvista, ma tqeghidx mad-dokument tal-offerta, waqt li certament ma jkunx qiegħed jithares il-principju tal-proporzjonalita' jekk offerita vantaggjuża tigi mwarba għax ma ngiebx dokument li għad jista' jingieb.”

Ample reference is also made to Case No. 960 - FTS 55/16: Tender for the Construction of Lift Shaft and Minor Internal Alterations Using Environmental Friendly Products at Haz Zebbug Child Care Centre decided by this Board, as differently composed, on the 9th August 2016 had decided on merits which are essentially identical to the case at hand. In this case the appellant had submitted its tender with a particular product, however following a request for clarification the appellant had sent literature of another identical product that was identical and interchangeable with the product submitted, and both products were identical, equivalent and had the same standard and quality level. In this case, as in the case at hand, the Contracting Authority had also considered this change to be a disallowed rectification to the Technical Offer.

It is humbly submitted that where a submission of literature for equivalent, interchangeable products that had the same standard and quality level as not deemed to be a change in the technical offer and not an instance that gave an advantage over other technically compliant bidders.

It is therefore submitted that since there was only a change of brand name, and not a change of form, then substance persisted and the Appellant's bid remained technically compliant since there was no rectification to the Technical Offer, and consequently, the Evaluation Committee was not justified in deeming the Appellant's offer as technically non-compliant.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 25th February 2022 and its verbal submission during the virtual hearing held on 26th April 2022, in that:

a) **Change in the original bid vs equivalence**

In its appeal, the objector argues that the FTS was bound to accept the second submission made by it, following the request for clarification dated 19th January 2022, and this since the objector claims that,

“it submitted technical literature, for those items indicated in the Rectification Request, which corroborated the technical specifications, which literature was simply provided from different, but equivalent brands” [vide provision 11 of the appeal by objector]

With all due respect, what the objector did is nothing more than a change in the original bid, which change cannot be accepted by the evaluation committee, nor can it be deemed acceptable to any judicial entity, since it directly infringes the procurement principles of ‘level-playing field’ and ‘equal treatment’;

The claim by the objector that it proposed equivalent brands is completely unconceivable (sic), since equivalence within this context is completely irrelevant - the conduct by the objector should lead to an automatic disqualification; The PCRB has repeatedly argued and confirmed that any changes to the original bid, post the closing date of the tender submission, amount to a change in the original bid, and cannot be accepted.

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“this Board would point out that, whilst it is the responsibility and obligation of the bidder to abide by the stipulated requirements of the tender document, it is also the duty and obligation of the Evaluation Committee to abide by the principle of self-limitation so as to ensure that equal treatment and level playing field prevail.”

b) **Proportionality**

While the reference by the objector to Judgements on the principle of proportionality delivered by Maltese Courts and of the Court of Justice of the European is certainly authoritative, it must be stated that the decision of the contracting authority to declare the offer to be technically not compliant is proportionate since it is suitable, necessary and does not place an excessive burden' on the objector as shall be explained hereunder. Hereby, reference is being made to a Court of Appeal judgment, which clearly demonstrates the requisites of proportionality, and which clearly confirm that they are not applicable to the situation de quo. In Fire-tech Limited (C17901) u Cross Zlin AS (60715886) flimkien maghrufa u msejha bhala Firetech Cross TLS Joint Venture kontra Dipartiment tal- Kuntratti, the court held that:

“Għalkemm huwa minnu illi, biex tiġi trasparenza u ma jkunx hemm diskriminazzjoni, ir-regoli għandhom jiġiharsu b'mod uniformi u prevedibbli, u s-soggettività u d-diskrezzjonalità jtnaqqsu kemm jista' jkun, madankollu l-principju ta' proporzjonalità jrid illi mhux kull nuqqas ikollu l-istess konsegwenza, iżda din għandha tiddependi mill-gravità tan-nuqqas u mill-konsegwenzi tiegħu, partikolarment jekk jagħtix vantagg lil min jonqos jew jobloqx preġudizzju lil oblaturi obra. Ma' huwiex bizżejjed illi, kif iġbid id-Dipartiment fit-twegiba tiegħu, huwa zamm id-dritt li jagħzel jiskwalifikax lil min ma jbarisx ir-regoli f'kollox ("The Department of Contracts reserves the right to disqualify Economic Operators who do not abide by the above instructions") iżda trid tqis ukoll in-natura u l-konsegwenzi tan- nuqqas.”

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 consider Appellant's grievances, as follows:

- a) **Deposit** – This Board notes that the Rejection Letter issued to C&F Building Contractors Ltd stated *“if you intend to object to this decision, the Public Procurement Regulations allow for against a deposit of €59,000”*. Reference is made to regulation 273 of the Public Procurement Regulations whereby *“The objection shall only be valid if accompanied by a deposit equivalent to 0.50 per cent of the estimated value set by the contracting authority of the whole tender or if the tender is divided into lots according to the estimated value of the tender set by the contracting authority for each lot submitted by the tenderer, provided that in no case shall the deposit be less than four hundred euro (€400) or more than fifty thousand euro (€50,000) which may be refunded as the Public Contracts Review Board may decide in its decision.”* Therefore, the maximum amount is clearly set at €50,000. Hence, no appellant should be made to deposit more than this amount to file an appeal before this Board.
- b) **Change in the original bid vs equivalence** – This Board agrees with the Contracting Authority in that this is not a case of equivalence but a change of submissions. Changing a brand in relation to a product which was offered / submitted in the Technical Offer Form (which falls under Note

3), is not possible and / or allowable. A change in 'brand' of a product is not the same as a change in a 'standard', something which may be considered acceptable under certain circumstances by a Contracting Authority.

- c) ***Proportionality*** – Considering that as per above, the actions of the Appellant are deemed to have changed its original offer, this Board opines that in this specific case, the Contracting Authority did in fact act proportionally whilst also observing the principle of self limitation.

In conclusion this 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 to Bonnici Bros Services Ltd,
- c) Directs that €9,000 out of the €59,000 deposited paid by Appellant to be reimbursed. The remaining balance of €50,000 is not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member