

PUBLIC CONTRACTS REVIEW BOARD

Case 1805 – MCAST/CFQ/2022/014 – Call for Quotation for the Supply and Delivery of Precision Measuring, Marking Out and Threading Tools for the Institute of Engineering and Transport within MCAST

7th November 2022

The Board,

Having noted the letter of objection filed by Mr Ivor Puglisevich acting for and on behalf of MCE Limited, (hereinafter referred to as the appellant) filed on the 7th October 2022;

Having also noted the letter of reply filed by Dr Thea Lynn Cesare acting for The Malta College for Arts, Science and Technology (“MCAST”) (hereinafter referred to as the Contracting Authority) filed on the 17th October 2022;

Having heard and evaluated the testimony of the witness Mr Donald Stevens (Representative of the Contracting Authority) as summoned by Dr Thea Lynn Cesare acting for MCAST;

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 1st November 2022 hereunder-reproduced.

Minutes

Case 1805 – MCAST/CfQ/2022/014 – Call for Quotations for the Supply and Delivery of Precision Measuring, Marking Out and Threading Tools for the Institute of Engineering and Transport within MCAST

The tender was issued on the 18th May 2022 and the closing date was the 9th June 2022. The estimated value of the tender excluding VAT, was € 8,104.

On the 7th October 2022 MCE Ltd filed an appeal against the Malta College of Arts, Science and Technology as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed to be not technically compliant and the subsequent cancellation of the tender.

A deposit of € 400 was paid.

There were five (5) bids.

On the 1st November 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – MCE Ltd

Mr Ivor Puglisevich

Representative

Contracting Authority – Malta College of Arts, Science and Technology

Dr Thea Lynn Cesare

Legal Representative

Ms Celine Portelli

Member Evaluation Committee

Ms Marilou Vella Micallef

Representative

Mr Donald Stevens

Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Mr Ivor Puglisivech Representative for MCE Ltd said that his submission was correct in all respects, was the cheapest and was within budget and hence there was no reason for rejection. Regulation 18.3(a) of the General Rules has certain parameters to allow cancellation but these were not met in Appellant's submissions. The appeal was filed within the time stated by the Authority in their letter of refusal. In the letter of reply MCAST gives reasons for refusal but these are not correct despite the fact that what was requested was what was offered. The brands offered are internationally recognized and of the best quality and Appellant is aggrieved that this is the third call to be cancelled.

Dr Thea Lynn Cesare Legal Representative for MCAST made reference to the lengthy reply sent to Appellant with full details. The Contracting Authority followed both procedure and law and the offer was refused on technical grounds. If there was any uncertainty regarding the measurement of the products offered there was always the availability of clarifications. The Authority had no option but to cancel. The tools in question were required so there was no interest in cancelling the tender. The doubts were not on quality but on measurements.

Mr Donald Stevens (513058M) called to testify by the Contracting Authority mentioned on oath the shortcomings in Appellant's bid. He mentioned that the difference in measurements were minimal both on the drills and the calipers, but though minimal they were still different to what the tender specified. This problem could have been easily clarified by an early clarification.

Mr Puglisivech retorted that such fine differences could easily have been clarified on the part of the Authority. Dr Cesare said that indeed a pre-bid clarification on the part of the Appellant would have saved the tender.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 1st November 2022.

Having noted the objection filed by MCE Limited (hereinafter referred to as the Appellant) on 7th October 2022, refers to the claims made by the same Appellant with regard to the tender of reference MCAST/CFQ/2022/014 listed as case No. 1805 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Mr Ivor Puglisevich

Appearing for the Contracting Authority: Dr Thea Lynn Cesare

Whereby, the Appellant contends that:

- a) Reference is made to the tender call and to the MCAST Recommendation Letter dated 28th August 2022, in which we were notified that no offers were considered. We deem that our offer was technically correct in all aspects and more over our bid was well below the estimated procurement value. The MCAST Recommendation Letter also did not indicate any technical non-compliances.
- b) Moreover, the reason quoted under Article 18.3(a) has no bases (sic) for disqualification of our offer. Our offer is technically compliant, with products from reputable European suppliers, at a total price below the estimated procurement value. There were five tender bids in total with our offer being the most economic.
- c) This would be the 3rd time these items have been requested via a tender (MEDE/MPU/MCAST/00320/20 Lot 3 and CFQ-2021-032) and subsequently each time the call being cancelled. Every call takes a lot of energy for us to prepare with such varied tools and instruments and different suppliers. I do think it is in the interest of all parties that we continue in putting forward our competitive offer.
- d) The MCAST Recommendation Letter has not indicated that a deposit is required for this objection.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 17th October 2022 and its verbal submission during the virtual hearing held on 1st November 2022, in that:

- a) **Preliminaries -**

This cancellation of the call for tenders has been exercised in terms of Article 13 et seq of S.L. 601.03, clearly providing the power to consider a cancellation of a procurement procedure during a call for tenders or quotations, which cancellation has been notified by means of a Recommendation Letter dated 28 August 2022.

It results that from the wording of Article 271 of S.L. 601.03 the Objection has been filed by MCE Limited *fuori termine*, as this article explicitly states that: *“The objection shall be filed within ten calendar days following the date on which the contracting authority or the authority responsible for the tendering process has by fax or other electronic means sent its proposed award decision or the rejection of a tender or the cancellation of the call for tenders after the lapse of the publication period.”*

Article 283 of S.L. 601.03 further underlines that: *“When the Director issues a decision cancelling a contractor an agreement according to regulation 261(7) he has to deliver this decision to the contractor affected by the cancellation. The contractor shall have ten days from the notification of this decision to file a motivated objection before of the Review Board.”*

The Letter of Objection of MCE Limited dates (sic) and was received by the Public Contracts Review Board on the 7 October 2022, which date is clearly way beyond the ten (10) days imposed by law. Therefore, the Board should not take cognisance of this Objection as it is in unequivocal breach of the Public Procurement Regulations and the time limits imposed by law.

b) **Merits -**

MCE Limited insists that *“our offer was technically correct in all aspects and more over our bid was well below the estimated procurement value.”* This argument fails to take into consideration the importance of providing the requested specific tools in accordance with the accuracies needed. For this reason, MCAST highlights that it was in fact not the case that the offer was "technically correct in all aspects" and this for the following reasons:

That the assessment was undertaken on three (3) items that MCE has failed on was that relating to the following Items:

1. Item 26 - Vernier Calliper at the requested size of 0 to 150mm - 0.02mm accuracy (inside and outside measurement, with fine adjustment slider)
2. Item 46 - Tapping drills for steel at the requested size of 3.3mm, (HSS material, for M4)
3. Item 47- Tapping drills for steel at the requested size of 4.2mm (HSS material, for M5)

By virtue of the wording of the Technical Offer Form, the information / technical specifications listed and provided by MCE Ltd in the Technical Offer Form table were not subject to rectification in terms of Note 3 of the "Call for Quotation for the Supply and Delivery of Precision Measuring, Marking Out and Threading Tools for the Institute of Engineering and Transport within MCAST." Therefore, the offer was deemed as non-compliant due to the following listed shortcomings as provided by the bidder:

1. Item 26 (2.1.26) - Vernier Calliper provided at a range of 0-130mm (as opposed to the requested range mentioned in point 9 above).

2. Item 46 (2.1.46) - Tapping drills for steel provided at 3.25mm as opposed to the requested size.
3. Item 47 (2.1.47) - Tapping drills for steel provided at 4.25mm as opposed to the requested size.

Therefore, the bid could not be awarded as the specific sizes provided by the bidder did not reach the thresholds indicated under Section 3 of the Technical Specifications, The sizes and ranges offered as duly indicated and submitted by the bidder did not meet the exigencies and the desired outcome of the procedure and no tolerances could be provided to the specifications offered by the bidder. Moreover, due to its very nature, the Technical Offer in question was not subject to rectification in terms of Note 3 of the same Technical Offer Form.

The mentioned items at the requested specifications were indeed provided by other bidders, thereby confirming that the standards desired are available on the market.

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 now consider Appellant's grievances.

a) **Preliminaries –**

The letter issued by the Contracting Authority on the 28th August 2022 includes no addressee, no information as to the deposit that should accompany the appeal as per the Public Procurement Regulations and wrong information as to when the appeal should be filed. Regulation 271 of the Public Procurement Regulations clearly states that *“the objection shall be filed within **ten** calendar days.....”* (bold & underline emphasis added). The letter dated 28th August 2022 on the other hand states *“The Public Procurement Regulations allow for an official objection which has to be lodged electronically with the Public Contracts Review Board by 8th October 2022 till noon.”* It also does not provide the reasons for rejection apart from quoting directly from Article 18.3 (a) of the General rules Governing Tenders. It goes without saying that such information provided, to who is not even known, is erroneous and / or misleading. Hence, due to all the above, this Board deems this letter to be null and void in its entirety.

A second letter was issued to Mce Ltd on the 28th September 2022 which prima facie seems to be in order. The appellant filed his objection within the timeframes provided and in accordance with the regulation 271 of the PPR.

Therefore, this Board does not uphold the Preliminary Plea of the Contracting Authority.

b) **Merits –**

At the outset, this Board notes that the Technical Offer Form is a 'Note 3' document. When one compares Section B Article 3 of the procurement document, special emphasis on items 26 (2.1.26),

46 (2.1.46) and 47 (2.1.47) to the Technical Offer Form as submitted by the Appellant company, it is noted that the information submitted by the appellant is somewhat different to the requested technical specifications of the procurement document. The thresholds requested were not met.

This Board also notes that the Appellant did not make use of any request for clarifications from the Contracting Authority to ascertain whether the products he offered were to be deemed as technically compliant, for e.g. through equivalence of standards.

If the Evaluation Board, did not proceed in the way it did, then it would not have established a level playing field between all operators.

Regarding arguments brought forward by Appellant that certain specifications were not possible to be met, this Board notes that such arguments on technical specifications were to be brought forward under a call for remedies as per regulation 262 of the PPR.

Therefore, this Board does not uphold Appellant's grievances on the merits of the case.

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 cancellation of the tender procedure,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Ms Stephanie Scicluna Laiviera
Member