

PUBLIC CONTRACTS REVIEW BOARD

Case 1251 – MJCL/MPU/93/2018 – Framework Agreement for the Supply of Cleansing Department’s Summer and Winter Uniforms using Environmentally Friendly Textile Materials

The publication date of the call for tenders was the 13th August 2018 whilst the closing date of the call for tenders was 11th September 2018. The estimated value of the tender (exclusive of VAT) was € 133,000.

On the 19th November 2018 Eagle K-Wear Company Ltd filed an appeal against the Ministry for Justice, Culture and Local Government as the Contracting Authority objecting to being disqualified on the grounds that their offer was technically not compliant. A deposit of € 475 was paid.

There were three (3) bidders.

On 15th January 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Richard A Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants: Eagle K-Wear Co Ltd

Dr Melvyn Mifsud	Legal Representative
Mr Noel Xuereb	Representative

Recommended Bidder: In Design (Malta) Ltd

Dr Maximilian Ebejer	Legal Representative
Ms Samantha Reed	Representative

Contracting Authority – Cleansing and Maintenance Division Ministry for Justice, Culture and Local Government

Dr Christopher Mizzi	Legal Representative
Mr Carmel Formosa	Chairman Evaluation Committee

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and invited Appellants to make their submissions.

Dr Melvyn Mifsud Legal Representative for Eagle K-Wear Company Ltd said this appeal arose as a result of a minor typographical error by the Appellant where a figure that should have read 160 grams per square metre (gm²) was submitted as 100 gm². A sample subsequently submitted was the correct weight and a true reflection of the Appellants' intentions. The Public Contracts Review Board is bound by the Code of Organisation and Civil Procedure. Under article 175 of the Code the Court allows the right of making corrections but not alter the substance of a matter. The Evaluation Committee should have realised that there was an error, and that there was no intention to mislead – it was a case of a simple typing mistake in one digit. No clarification had been sought by the evaluation committee.

Mr Noel Xuereb stated that he was the Sales and Marketing Manager of the Appellant firm who were manufacturers of clothing apparel and the issue was on one item out of seven in their bid. According to the tender item 1 had to have material of a nominal weight of 140/200 gm². In their submissions they indicated in the tender literature that the material was of a weight of 100 gm² which he accepts was outside the tender requirements. The evaluators should have realised that this was a typing error as polo shirts in 100 gm² weight did not exist. (Appellant displayed to the Board samples of fabric weights to illustrate his point). If a clarification had been requested the Appellants would have had the opportunity of presenting certificates from the manufacturer (tabled) confirming the correct weights.

The Chairman pointed out that in Public Procurement Regulations (PPR) the principle of self-limitation binds both the Contracting Authority and the bidder to adhere to the tender specifications. Clarification can only be sought on documentation submitted otherwise any changes become a rectification. The Board is bound by the PPR. Errors cannot be justified through clarifications.

Dr Melvyn Mifsud requested referral of the bid back to the evaluation committee. Article 175, as mentioned earlier, obliged the PCR to go beyond the PPR. The sample submitted by the Appellant made it clear that there was a genuine typing error in the original submission. It was just and equitable to consider the possibility of changing the existing regulations to create case law by following the principle of natural justice.

The Chairman again pointed out that Public Procurement is a specific law and takes precedence over general law. The crux of this Case is the tender submission not the supplying of a sample to support submissions.

Dr Christopher Mizzi, Legal Representative for the Ministry for Justice, Culture and Local Government stated that the tender document stipulates clear rules regarding rectification and clarification. The literature as presented, and accepted by the evaluation committee, cannot be changed according to Note 2 (b) in the tender documents; therefore no rectification could be asked for, and the evaluators could not assume that an error existed in the submissions or that in the bidders' mind there was something different to what was submitted. Literature is part of the contract and determines the basis of that contract and binds both parties to it. The evaluation committee was twice faced with the same wrong literature (original submission and second submission with sample) although the second lot of literature could not be considered as no rectification was allowed.

Dr Melvyn Mifsud re-iterated that that he was seeking a correction of an intrinsic part of the tender – it is impossible to produce a polo shirt in 100 gm² materials, hence it should have been obvious to the evaluators that something was wrong in the submissions. He requested to hear the views of a member of the evaluation committee.

Mr Carmel Formosa (412974M) called as a witness by the Board, testified on oath that he was the Chairperson of the evaluation committee. The evaluation process had taken place over two or three meetings. The sample was requested from the bidder to substantiate the doubts the committee had about the offer in the literature. On receipt of the sample it became obvious that the literature was wrong and there was no point of going any further into the merits of the weight of the materials. Witness stated that he has served on various evaluation boards for about 18 months, and he does not recall that this matter was referred to a technical evaluator as the error was self-evident. The evaluation of this bid had stopped at the stage when the second set of literature quoted the same material weight as the first submission.

Dr Maximilian Ebeyer Legal Representative of In Design (Malta) Ltd stated that there was a contradiction in this appeal, in so far as the individual appealing is the one who twice made the wrong submissions. It would be discriminatory of the PCRБ to start making assumptions as to what the Appellant meant and it would go against the PPRs.

Dr Melvyn Mifsud again urged the Board to follow Article 175 which allowed corrections and they are obliged to follow the procedure of the Court – a genuine mistake should not disadvantage the Appellant.

The Chairman again pointed out that the PCRБ follows laid down local and European directives – their decisions are regularly monitored by the European Public Procurement body, and the PPRs are their only remit and guide.

At this stage Dr Mifsud formally requested that a Note be entered in the Minutes of the proceedings, as dictated verbatim by him:

“On behalf of the Appellants Eagle K-Wear Co Ltd in view of the fact that the weight of the sample in question produced at the evaluation stage does not tally with the figures submitted by the Appellant in writing in the tender documents, this in the sense that this document should have indicated the same weight to be 160 gm² on the basis of Article 175 that allows a party, the same Appellant humbly requests that wherever figure of 100 gm² is indicated in the same documents this is substituted by the figure of 160 gm². This is being said in the light that this Board may order that proceedings be submitted to the evaluation committee for its consideration all this being said in the light of the oral submissions or orders the correction and treats the matter on its merits.”

Dr Christopher Mizzi asked for the Minutes to record that the Director of Contracts opposes the insertion of this Note in the Minutes.

Mr Noel Xuereb (422664M) called as a witness by the Board, testified on oath that the mistake referred to in the submissions was a typographical error and confirmed that it had been committed by him.

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

This Board,

having noted this Objection filed by Eagle K-wear Limited, (hereinafter also referred to as the Appellants), on 19 November 2018, refers to the contentions made by the latter with regards to the award of Tender of Reference MJCL/MPU/93/2018 listed as Case No 1251 in the records of the Public Contracts Review Board and awarded by the Ministry for Justice, Culture & Local Government, (hereinafter also referred to as the Contracting Authority).

Appearing for the Appellant:

Dr Melvyn Mifsud

Appearing for the Contracting Authority:

Dr Christopher Mizzi

Whereby, the Appellants contend that:

- a) their offer was rejected due to an inadvertent clerical error. In this regard, the Appellants maintain that the sample submitted was in accordance with the requested technical specifications and that the Contracting Authority should have requested a clarification. At the same instance, the Appellants insist that had there been a technical person on the Evaluation Committee, such an obvious clerical error**

would have been easily noted and remedied to the benefit of the Contracting Authority.

This Board has also noted the Contracting Authority's "*Reasoned Letter of Reply*" dated 28 November 2018 and also its verbal submissions during the Public Hearing held on 15 January 2019, in that:

- a) The Ministry for Justice, Culture and Local Government re-affirms that the Appellants submitted literature which quoted the incorrect weight in their original submission. The Appellants were given the opportunity to rectify when samples were demanded, yet upon the submission of literature, for the second time, the latter once again specified the incorrect weight of the material;

- b) The Contracting Authority also insists that the samples provided had to represent the Appellants' declared weight in their technical offer and in this respect, the accompanying literature so submitted did not confirm the weight of the material of the sample.

This same Board has also noted the testimony of the witnesses namely,

1. Mr Noel Xuereb who was duly summoned by Eagle K-wear Limited;

2. Mr Carmel Formosa who was duly summoned by the Public Contracts Review Board.

This Board has also taken note of the documents submitted by Eagle K-Wear Limited which consisted of a sample of a T-Shirt.

This Board, after having examined the relevant documentation and heard the submissions made by all the interested parties, including the testimony of the witnesses duly summoned, opines that the issues that deserve consideration are two-fold namely;

1. The Submissions made by Eagle K-Wear Limited;
2. The Evaluation Procedure of the offer submitted by Eagle K-Wear Limited.

1. The Submissions made by Eagle K-Wear Limited

This Board would respectfully refer to the dictated technical specifications relating to the product under appeal, namely “*Polo Shirt, short sleeved*” as follows:

<u>No</u>	<u>Item</u>	<u>Colour</u>	<u>Technical Specification</u>
1	<i>Polo Shirt, Short Sleeved</i>	<i>Grey Base Colour 3 Tone</i>	<i>Short Sleeved</i>
			<i>Polo Shirt Style with 3 Matching Buttons</i>
			<i>Clean Finish Placket</i>
			<i>Rib Knit Collar</i>
			<i>Cuffed Sleeves</i>
			<i>Pre-Shrunk Material at 100% Cotton</i>
			<u><i>Nominal 140-200g/sq metre</i></u>
			<i>Colour – 3 tone. Please see photograph. Colour fast.</i>
			<i>CMD Logo embroidered on front left, approximate size 10cm wide by 6cm high</i>
			<i>Label fixed indicating manufacturer, date of manufacture, size, material, washing instructions (to withstand not less than 40°C)</i>
			<i>Garment must comply with BS 5426, Specification for workwear and career wear, or equivalent.</i>

Included in the above specifications, is the nominal weight per square metre of fabric which is clearly stated in a range of 140-200g/sq metre.

In their submissions, Eagle K-Wear Limited quoted a nominal weight of 100g/sq metre, so that it is amply clear that such a weight is not within

the dictated range. In this respect, the Appellants are insisting that such a quote was an inadvertent typing error in the submission of literature and the sample should have shown up this typing error.

- a. First and foremost, this Board would prudently point out that the jurisprudence and remit of this Board is to consider the merits of this case through strict adherence to the Public Procurement Regulations;**
- b. This Board would emphasize that technical specifications are not capriciously dictated in a Tender Dossier, but are so stipulated so as to achieve the objectives of the Contracting Authority in the most professional manner to the benefit of the latter. At the same instance, the technical specifications must be attainable, easy to understand and be dictated in such a manner so as to serve as the yard stick in the evaluation process, thus maintaining transparency, equal treatment and self-limitation. In this regard, the technical specifications stipulated in this particular case, satisfied all these basic principles.**

In this case, the Evaluation Committee was presented with a technical offer which differed from that so requested in that, the stipulated nominal weight of fabric was in the range of 140-200gr/sq

metre whilst the Appellants' offer was 100 gr/sq metres. This Board notes that the technical specification in this particular component of the product consisted of a range so that the Contracting Authority did not impose a particular weight and allowed similar products which fall within the range of 140-200gr/sq metres;

c. Eagle K-Wear Limited are maintaining that through an inadvertent mistake, their figure of 160g/sq metres should have replaced the submitted figure of 100g/sq metres. In this respect, this Board would point out that, the Evaluation Committee can only adjudicate offers on the information submitted by the Bidders and being a technical issue, the latter is restricted in all respects to ask for any clarification on the incorrect submission, so that no clarification requests could be asked by the Evaluation Committee;

d. With regards to Eagle K-Wear Limited's contention that the Evaluation Committee should have noted from the submitted literature that there was a genuine mistake in the nominal weight declared in the Technical Offer, this Board would respectfully point out that, the purpose of the literature, when requested, is for the Contracting Authority to ensure that the declared product in the offer is available and can be delivered, and most importantly, the

Literature must contain the same technical specifications as those declared in the technical offer of the Bidder. In this particular case, the technical data in the Literature twice submitted by the Appellants did not tally with that so declared in the tender specifications;

- e. With regards to the Appellants' contention that, if a technical person was present during the Evaluation process, such a person would have realised that the nominal weight of the material was misquoted in their technical offer, this Board re-affirms that the Evaluation Committee cannot amend an incorrect quotation of a particular item as otherwise it will breach the principles of transparency, equal treatment and self limitation.**

In view of the above, this Board confirms that Eagle K-Wear Limited's original submission did not satisfy the technical requirements of Item No 1 (Polo Shirt), as duly dictated in the Tender Document.

- 2. The Evaluation Procedure of the offer submitted by Eagle K-Wear Limited**
- a. Eagle K-Wear Limited contends that the Evaluation Committee should have requested a clarification, once the Literature and the sample had been submitted. In this regard, this Board would respectfully point out that the Evaluation Committee are not obliged and in fact, cannot seek clarification to rectify an incorrect figure in a particular offer;**
- b. This Board would also point out that the fact that the literature submitted conformed to the range of nominal weight per sq metre, such documentation does not replace the original submission as the purpose of the literature, as already explained in the previous paragraphs, is to confirm that what the Appellants declared to offer can be delivered to the Contracting Authority to match in their technical offer;**
- c. With regards to the presence of a technical person on the Evaluation Committee, this Board does not find any justifiable possibility that the presence of a technical person would have bettered the chances of**

success which the Appellants' offer might have had, as the original offer cannot be justifiably altered by the Evaluation Committee;

d. With regards to the Appellants' contention that the Public Contracts Review Board is bound by the Code of Organisation and Civil Procedure, so that this Board can effect corrections but not alter the substance, this Board would respectfully point out that it is regulated by the Public Procurement Regulations, the latter representing specific rules and regulations on public procurement and in accordance with such regulations, no corrections to the original quotations and/or offers are allowed.

3. On a general note, this Board would emphasize the importance which should be given by the Bidders when submitting their offers. At the same instance, this Board would point out that it is the responsibility and obligation of the Bidders to submit offers in accordance with the conditions and technical specifications as so dictated in the Tender Document. One must not shift the onus of an original mistake or incorrect information submitted by the Bidder, on to the Evaluation Committee to correct an error in the Bidder's original offer. On the other hand, one must acknowledge that clarifications should not be tools

for amending or correcting an error or incorrect information submitted by a Bidder.

In view of the above, this Board,

- a) does not uphold the contentions made by Eagle K-Wear Limited;**

- b) confirms that the Evaluation Committee carried out the Evaluation Process in a just and transparent manner;**

- c) upholds the decision taken by the Ministry of Justice, Culture and Local Government in the award of the Tender;**

- d) directs that the deposit paid by the Appellants should not be refunded.**

Dr Anthony Cassar
Chairman

Mr Carmel Esposito
Member

Mr Richard A Matrenza
Member

24th January 2019