

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 751**

**CT 2040/2014**

**Tender for the Supply, Installation and Commissioning of Mechanical & Electrical Services in an Environmentally Friendly Manner at the ESN School in Msida.**

The tender was published on the 14<sup>th</sup> March 2014. The closing date was the 24<sup>th</sup> April 2014.

The estimated value of the Tender was €199,126.40 (Exclusive of VAT).

On the 26<sup>th</sup> September 2014 General Repairs & Maintenance Services Limited filed a letter of objection objecting to the disqualification of their tender and against the proposed award of the tender to CE Installations Ltd.

Seven (7) offers were submitted for this tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday the 28<sup>th</sup> October 2014 to discuss the objection.

Present for the hearing were:

### **General Repairs & Maintenance Services Limited - Appellant**

|                     |                      |
|---------------------|----------------------|
| Mr George Azzopardi | Representative       |
| Mr Jonathan Mifsud  | Representative       |
| Dr Angie Muscat     | Legal Representative |

### **CE Installations Limited - Preferred Bidder**

No representatives

### **Foundation for Tomorrow's Schools - Contracting Authority**

|                            |                            |
|----------------------------|----------------------------|
| Mr Stephen Bonello         | Chairman Evaluation Board  |
| Mr Ivan Zammit             | Secretary Evaluation Board |
| Mr Edward Caruana          | Member Evaluation Board    |
| Mr Joseph Zerafa           | Member Evaluation Board    |
| Dr Simon Micallef Stafrace | Legal Representative       |

### **Department of Contracts**

|                  |                     |
|------------------|---------------------|
| Mr Antoine Galea | Procurement Manager |
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The Chairman made a brief introduction and invited appellant's representative to make her submissions.

Dr Angie Muscat on behalf of the appellants said that her clients' tender, although being the cheapest, had been rejected because of the time frames that had been considered to be unreal and because they did not submit the technical literature. She contended that the contracting authority could not decide that the time frames submitted by appellants were not realistic without first giving them a chance to operate. She claimed that her clients were not asked to produce the technical literature.

The Chairman remarked that the requisite was written in the tender document at page 23.

Mr Jonathan Mifsud on behalf of the appellants agreed that the submission of the technical literature was a requisite. However he explained that the tender document had contained an error and a discrepancy of €10,000. Subsequently appellants had received a clarification of an arithmetical error in their bid and were asked to accept the correction to the amount of €110. They had accepted the correction. He contended that the contracting authority should have asked the appellants at the same time to rectify the missing technical literature that had not been submitted with the original tender offer. He insisted that since the contracting authority had corrected appellants' offer it should also have asked appellant to correct the other omission by asking them to submit the technical literature. He admitted that the technical literature had not been submitted.

The Chairman explained that the contracting authority could not ask for additional information that was omitted in the original bid, it could only ask for clarifications.

Mr George Azzopardi on behalf of the appellants insisted that the contracting authority should have asked appellants to submit the technical literature that was omitted in their bid. Otherwise, their tender should have been disqualified at that time, they should not have been asked to correct the arithmetical error.

Dr Simon Micallef Stafrace on behalf of the contracting authority explained that the tender was clear that it was mandatory to submit technical literature. Regarding the mathematical correction he explained that once an error was discovered, the contracting authority was bound to ask all bidders to accept any arithmetical errors involved, and this included the appellants. He cited a judgement delivered by the Court of Appeal on the 7<sup>th</sup> August 2013, case 175/13 in the names Steel Shapes Limited versus the Department of Contracts wherein the matter in question was tackled and it was decided that a bidder had to submit all mandatory documents. He also referred to another case decided by the European Court in - T 415/10 Nexans vs France where this point was decided and other similar cases. All these state that the contracting authority cannot depart from the original conditions of the tender and in this case it was mandatory to submit technical literature and rectification was not allowed.

Mr Jonathan Mifsud queried whether technical literature was equivalent to technical specifications and admitted submitting only the tender offer. He explained that appellants' copy of the tender offer was stolen from his car and cannot check whether documents were included with their offer.

Dr Franco Agius on behalf of the Contracting authority explained the list wherein bidders

were asked to produce the necessary technical literature.

The hearing was at this point closed.

**This Board,**

**Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 26<sup>th</sup> September 2014 and also through Appellant's verbal submissions during the hearing held on 28<sup>th</sup> October 2014, had objected to the decision taken by the pertinent Authority, in that:**

- a) Appellant contends that his offer was the cheapest and same was rejected by the Contracting Authority due to the fact that the 'time frames' as quoted by the Appellant were considered to be unrealistic. In this regard Appellant claims that the Contracting Authority did not give valid reasons why his offer was considered as such.**
- b) Appellant also claims that the Contracting Authority had the opportunity to ask for the missing technical literature when same made clarifications due to an arithmetical error which Appellant accepted.**

**Having considered the Contracting Authority's 'Letter of Reply' dated 27<sup>th</sup> October 2014 and also the verbal submissions during the hearing held on 28<sup>th</sup> October 2014, in that:**

- a) Appellant Company failed to submit the technical literature which was mandatory as specified on page 23 of the tender document. Due to this omission on the part of the Appellant, the Evaluation Committee was not in a position to evaluate the Appellant's offer.**
- b) The Contracting Authority could not request missing technical documentation from the Appellant as this would lead to a rectification.**

**Reached the following conclusions:**

- 1. With regards to Appellant's first grievance; this Board, after having heard all submissions and at the same time examined the Evaluation Committee's report, is credibly convinced that in the same report there was no justifiable reason stated to justify the Evaluation Board's declaration that Appellant's 'time frames' were not realistic. This Board strongly opines that in the 'Letter of Rejection', the Contracting Authority failed drastically to substantiate the facts why Appellant's 'Time frames' were not realistic. In this regard, this Board upholds Appellant's first grievance.**
- 2. This Board opines that a request for technical literature in a tender document is laid out to ensure a clear understanding by the Evaluation Committee of the specifications of the product the Prospective Tenderer is offering. At the same**

time, the technical literature so requested, will give the required proof and assurance of the 'technical compliance' of the product. This Board contends that the technical literature goes 'pari passu' with the technical requirements as listed in the tender document. It has been justifiably proven on many occasions, that without any technical specifications, the Evaluation Committee would not be able to arrive at a fair and transparent evaluation of the product being offered by the tenderer. In this regard, this Board confirms that Appellant Company did not submit this mandatory requirement.

3. The Evaluation Committee could not ask for missing information at the evaluation stage as this would have resulted in a rectification. In this respect this Board upholds the Evaluation Committee's that Appellant's bid was technically non compliant.

**In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by Appellant should not be reimbursed.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*7 November 2014*