

PUBLIC CONTRACTS REVIEW BOARD

Case No. 961 – FTS 045/2016: Tender for the Supply of Stage Lighting for Various Schools.

The Tender was published on the 5th April 2016. The closing date was on the 26th April 2016. The estimated value of the Tender is €16,520.00 (Exclusive of VAT).

Three (3) bidders had made five (5) offers for this Tender.

On the 24th June 2016 International Trading Company Limited filed an Objection against the decision of the Contracting Authority that found its Tender Technically Non-Compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a hearing on Tuesday the 2nd August 2016 to discuss the Objection.

Present for the hearing were:

International Trading Company Limited:

Mr Mario Camilleri	Representative
Mr Adrian Figallo	Representative
Dr Marion Camilleri	Legal Representative
Dr Amadeus Cachia	Legal Representative

Nexos & Company Limited:

Mr Jesmond Bondin	Managing Director
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Foundation For Tomorrow's Schools:

Mr Franco Cassar	Chairperson Evaluation Board
Mr Ivan Zammit	Secretary Evaluation Board
Mr Marco Cassar	Member Evaluation Board

The Chairman made a brief introduction and invited the Appellant's representative to make his submissions.

Dr Amadeus Cachia on behalf of International Trading Company Ltd said that the Letter of Rejection gave no details whatsoever and was not according to law. The letter just stated that his client's Tender options were Technically Non-Compliant without offering an explanation.

Dr Cachia contended that his client should have been given more information such as the Recommended Bidder's price, deadline for filing an Objection and more. The letter just referred to the dimmer specifications and did not give specific details and just skimmed through matters. He insisted that the Contracting Authority should have asked the Appellant to rectify the offer.

Mr Adrian Figallo on behalf of International Trading Company Ltd submitted that their Tender had been rejected because for item 1.6 – DMX dimmer, it offered 2 times 12 boxes instead of the requested 1 by 24.

He contended that this did not make sense since any combination of 1 by 12 box could be used to obtain the desired number, even up to 36 by using 3 times 12, and wished to ask the Contracting Authority what was the difference. Mr Figallo insisted that the end result would have been the same and the product offered by the Appellant was not inferior in any way. He also alleged that the Tender specifications were tailor-made from the specifications of the chosen product.

The Chairman pointed out that if Appellant had any doubts why the Contracting Authority was insisting on having 1 by 24 box instead of 2 by 12 this should have been cleared before submitting the Tender through clarification. Recourse could also have been demanded by filing pre-contractual concerns about any cut and paste specifications.

Mr Franco Cassar, the Chairperson of the Evaluation Board, on behalf of Foundation for Tomorrow's Schools submitted that the Letter of Rejection sent to the Appellant had given clearly the reason why the Appellant's Bid was rejected. This was because the latter had offered dimmer at 2 by 12 while the Tender specifications had asked for 1 by 24.

Five offers had been received – 3 from the Appellant, one from Nexos and one from MST Audio Visual and the specifications were definitely not tailor-made. The Evaluation Board had to see that bidders followed the specifications. There could have been other bidders who had 1 by 12 and failed to Tender because of this. If the matter was so important the Contracting Authority should have asked Appellant for clarification before rejecting the Tender.

The Chairman explained that the hearing had to abide with the Letter of Objection. The onus is on the bidder to offer what was demanded.

Mr Ivan Zammit on behalf of Foundation for Tomorrow's Schools said that the Appellant should have asked for clarification before submitting the offer. The Contracting Authority was precluded by law from communicating with any of the bidders. Rectification was possible only on what was already submitted but in this case the Appellant's offer was technically non-compliant. The reason was clearly given in order to help in future Tenders.

Mr Mario Camilleri for the Appellant insisted that the Contracting Authority had no explained the reason for choosing the specifications.

The Chairman pointed out that this hearing was not intended to discuss the specifications but to examine the procedure used for adjudication.

At this point the hearing was closed.

This Board,

Having noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection*" dated 24 June 2016 and also through their verbal submissions during the Public Hearing held on 2 August 2016 had objected to the decision taken by the Pertinent Authority, in that:

- a) International Trading Company Ltd is contending that no reasons were given by Foundation for Tomorrow's Schools on why the former's bid was rejected. The Letter of Rejection should have also contained information as to the remedies available for the Appellant;**

- b) The Appellant maintains that since his offer regarding the DMX Dimmer consisted of 2 by 12 boxes instead of one by 24, the result of which would have been the same, the Contracting Authority should have asked for Clarifications from the Appellants.**

Having considered the Contracting Authority's "*Letter of Reply*" dated 6 July 2016 and also their verbal submissions during the Public Hearing held on 2 August 2016, in that:

- a) Foundation for Tomorrow's Schools insists that the "*Letter of Rejection*" did in fact give the Technical Reasons why the International Trading Company Limited's Bid was Technically Non Compliant;
- b) The Contracting Authority contends that if the Appellant had any doubts about the dimmers or any other matter, he should have asked for a clarification prior to submission of his offer.

Reached the following conclusions:

1. With regards to the Appellant's First Grievance, this Board, after having examined the relative documentation and credible submissions by the Contracting Authority, opines that the "*Letter of Rejection*" dated 17 June 2016, clearly mentions and explains as to why the International Trading Limited's offer was rejected.

The "*Letter of Rejection*" was precise in quoting the Evaluation Report for "*Option A*", "*Option B*" and "*Option C*" and it gave a

Technical Reason why each option was rejected. On the other hand, it is an established fact that available remedies with time frames were not stated in the said “*Letter of Rejection*”.

Although this Board does not approve of such a procedure, the latter is also justifiably aware that International Trading Company Limited did, in fact, object within the specified period together with the correct deposit, in order for such information to be easily obtained, (although this is neither recommended nor advised), from the website of the Contracting Authority or from the latter’s office. In this regard, this Board rejects the International Trading Company Limited’s First Grievance.

- 2. With regards to the Appellant’s Second Grievance, this Board, as it had on many occasions, emphasize the basic fact that if a prospective Bidder is in doubt about a particular item in the Tender Document, he has the facility to ask for Clarifications.**

The onus for clarifying these doubts rests upon the Bidder and not the Contracting Authority. In this respect, this Board credibly notes that the Appellant did not avail himself of such a remedy.

This Board would also like to point out that International Trading Company Limited could have availed itself of a Pre-Contractual Concern regarding any difficulty or doubt prior to the Closing Date of the Tender.

This Board notes that the Appellant did not avail himself of this remedy as well. This Board would like to justifiably point out that it is of no avail for a Prospective Bidder to submit to this Board Objections regarding items in a Tender Document which could have been easily solved through official legal remedies. In this regard, this Board does not uphold the Appellant's Second Grievance.

In view of the above, this Board finds against International Trading Company Limited and recommends that the deposit paid by the latter should not be refunded.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

9 August 2016