

PUBLIC CONTRACTS APPEALS BOARD

Case No. 201

Advert No. 440/2009; CT/2477/2009

Publicity and Marketing Campaign for the ESF 3.59 NISTA Project

This call for tenders was published in the Government Gazette on 27th November 2009. The closing date for this call for offers with an estimated value of €1,068,920 was 19th January 2010.

Two Tenderers had submitted their offers

JP Advertising Ltd filed an objection on the 9th March 2010 after its offer had been adjudicated administratively non-compliant for having disclosed the price offer in the Tenderer's Declaration Form in package 2.

The Public Contracts Appeals Board composed of Mr. Anthony Pavia as Chairman and Mr. Edwin Muscat and Mr. Carmel Esposito as members convened a public hearing on Wednesday, 12th May 2010 to discuss this objection.

Present for the hearing were:

JP Advertising Ltd

Dr Franco Vassallo	Legal Representative
Ms Becky Vassallo	Representative
Mr Chris Bianco	Representative

WE Advertising Ltd & MPS Ltd

Dr Adrian Delia	Legal Representative
Dr Mark Vassallo	Legal Representative
Mr George Mifsud	Representative
Mr Christopher Mifsud	Representative
Mr P J Vassallo	Representative
Mr Lou Bondi	Representative

Employment and Training Corporation (ETC)

Dr Ivan Gatt	Legal Representative
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Evaluation Committee:

Mr Louis Cuschieri	Chairperson
Mr Felix Borg	Member
Ms Josephine Farrugia	Member
Mr Tonio Montebello	Member
Mr Martin Casha	Secretary

Mr Anthony Pavia informed those present that he had been appointed to chair the hearing because the regular Chairman PCAB (Mr. Alfred Triganza) felt that he should not preside over this case.

After the Chairman's brief introduction, the appellant was invited to explain the motives of the objection.

Dr Franco Vassallo, on behalf of JP Advertising Ltd, explained that his client was disqualified for disclosing the price he offered in the Package Two whereas it was claimed that it should have been disclosed in Package Three. Dr Vassallo further explained that the tender document itself in the Declaration Form referred to in Point 3 of the Service Tender Submission Form (page 80) the tenderer was requested indicate 'The price of our tender is:.....', i.e. the full price. Dr Vassallo stated that his client faced a dilemma in the sense that according to the same tender document he should either, in terms of 4.2 (b) Technical Offer (Instructions to Tenderers), have to submit a signed declaration form using the format attached to the Tender Submission Form, conscious that he was not at liberty to refrain from giving requested information, while at the same time he would be infringing the tender conditions which also indicated that the price must be submitted in the 3rd Package. Dr Vassallo argued that the bidder was not expected to contact the contracting authority or the Director of Contracts to clarify this point and, furthermore, his client had submitted other tenders of the same nature (CT2070/2009); CT2068/2009; CT2187/2009) where he had submitted this same information and the bids were not disqualified. Dr Vassallo stated that that was another reason why his client did not feel the need to seek any clarifications.

Dr Vassallo argued that those were the facts and therefore what one had to deliberate upon was the remedies to this situation, which, in his view were: to reintegrate his client's tender in the tender process if it is judged that this disclosure did not prejudice the process but would maintain the same level of competition to the benefit to the contracting authority; the cancellation of the tender because the tender instructions were contradictory and misleading and to engage into a negotiated procedure if it was deemed that delay in awarding the tender could jeopardize EU funds. Dr Vassallo contended that his client abided by the tender instructions and stood to be penalised whereas other tenderer/s decided to unilaterally discard/ignore certain instructions and stood to be rewarded instead of being disqualified. For the sake of justice and equity Dr Vassallo called on the PCAB either to reintegrate his client in the tender process or to cancel the tender.

Dr Ivan Gatt, obo the ETC, stated that the appellant based his argumentation on the conflict that existed in two separate provisions in the tender document however Dr Gatt referred to section 2 of the Draft Service Contract 'Structure of the Contract' which listed in order of precedence the special conditions and annexes and the last sentence stated that 'In case of any contradiction between the above documents, their provision shall be applied according to the above order of precedence' where Annex V 'Budget' preceded Annex VI 'Forms and other relevant documents'. Dr Gatt claimed that these provisions outlined that article 4 which in its NB stated that 'Financial proposals are to be submitted ONLY in package three' took precedence over the 'forms' that were to be submitted. Dr Gatt stated that it was not unheard of that a contract would contain conflicting clauses however, in such cases, the contract itself would provide for its interpretation. Dr Gatt also referred to article 4 (iii) of the Instructions to Tenderers which stated 'Package Three; Completed price schedules and, or bills of quantities ...'

Dr Vassallo contended that the appellant referred to the 'draft service contract', which was meant to regulate the relationship between the awarded tenderer and the client once the contract had been awarded, and not to the tender conditions. Dr Vassallo contended that the contracting authority was confirming his point that the tender documents contained conflicting conditions which, he claimed, misled his client.

Dr Adrian Delia, obo WE Advertising Ltd & MPS Ltd, an interested party, while expressing agreement as to the fact that there existed conflicting conditions in the tender document, at the same time submitted the following:

The appellant was not disqualified for submitting the 'service tender submission form' in envelope 2 but for disclosing the price in envelope 2.

Contrary to what the appellant stated, there were the following options open, that is: (i) to submit the 'service tender submission form' in package 2 and in the space provided for the price he could have indicated 'as per package 3' - he contended that tenderer/s who acted in this manner did not go against tender condition - (ii) section 82 (1) of the Public Contracts Regulations clearly indicated that in the three package system the price had to be given in envelope 3; (iii) the Director of Contracts ought to look into the appellant's claim that he had participated in other tendering processes and that he had made similar submissions but his offers had not been disqualified but Dr Delia insisted that even if that were to be the case 'two wrongs did not make a right'; (iv) contrary to what the appellant stated, it was admissible to seek a clarification on such a point prior to the closing date of tender and went further to state that such clarifications were an integral part of the tendering process. Dr Delia conceded that the appellant could have been misled to a certain extent however the appellant had ways how to remedy the situation.

Dr Delia stressed that in a three package system it was imperative not to disclose the price prior to package 3 otherwise it would condition and prejudice the tendering process. He added that this principle has been retained in the revised Public Procurement Regulations published the day before this hearing. Dr Delia claimed that the adjudication board acted properly in disqualifying the appellant for having infringed a basic provision of the three package system, i.e. the disclosure of the price in envelope 2, and in considering his client's offer compliant since it respected the tender conditions.

Dr Delia then rebutted the remedies indicated by Dr Vassallo in the sense that (a) the reintegration of the appellant was out of the question because his tender submission violated the provision laid down in legislation and even infringed the tender conditions, (ii) there were no grounds for the cancellation of tender and (iii) the conditions were not present to undertake the negotiated procedure.

Dr Delia argued that the option left for the appellant was to take legal action against the ETC, the contracting department, or against the Contracts Department

In the case of such conflicts in a tender document then the law should prevail and in this case the law so provided. He quoted the PCAB judgements in cases 164 and 33 to further prove his point

Dr Gatt shared the view expressed by Dr Delia that the appellant could have easily asked for a clarification.

Dr Vassallo remarked that the PCAB should not tolerate a situation where a contracting authority issued a call for tenders with conflicting provisions whereby a bidder was expected to ignore and to discard the specific request made in the tender document, i.e. the last part of section 4 (iii) stated that:

Each Technical Offer and Financial Offer must contain one original clearly marked "Original" and 2 copies, each marked "Copy". Failure to respect the requirements in clauses 4.1, 4.2 – which Dr Vassallo referred to - 4.3 and 8 shall result in the rejection of the tender.

N.B. Financial proposals are to be submitted ONLY in package three.

Dr Vassallo reiterated that his client respected the provisions in the tender by submitting the form at section 4.2. which turned out to be in conflict with the Nota Bene and that was the reason why he was calling for the cancellation of the tender. He claimed that it appeared that the other tenderer had not respected the tender conditions if he did not fill in the 'Tenderer's Declaration' at page 80 and that the disqualification of his client's offer would eliminate competition to the detriment of the contracting authority.

Dr Gatt refused the contention that there were conflicting clauses when the tender document provided for ways how to deal in such cases besides the fact that, as Dr Delia had mentioned, the regulations outlined what the three packages had to include.

Dr Delia concluded that the grounds that merited resort to the negotiated procedure were found at section 38 (1) where not applicable to this case. He added that the same applied with regard to section 38 (6) which dealt with the cancellation of the tender. Dr Delia argued that this hearing was not convened to consider the cancellation of the tender because that was the responsibility of the Director of Contracts but to look into whether the appellant should be disqualified or reintegrated in the tendering process.

Dr Vassallo claimed that had the adjudication board acted correctly according to regulations and likewise disqualified the other tenderer with the result that none of the tenderers were compliant then there would have been grounds to undertake the negotiated procedure. Dr Vassallo concluded that in his letter of objection he had asked for his client's offer to be reinstated and, failing that, the PCAB should consider the tendering process null and void because the tender document had not been drawn up according to regulations.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 15 March 2010 and also through their verbal submissions presented during the public hearing held on 12 May 2010, had objected to the decision taken by the General Contracts Committee;
- having heard Dr. F. Vassallo state that his client was disqualified for disclosing the price he offered in the Package Two whereas it was claimed that it should have been disclosed in Package Three, and his arguments that that the tender document itself in the Declaration Form referred to in Point 3 of the Service

Tender Submission Form (page 80) provided that the tenderer was requested to indicate ‘The price of our tender’, i.e. the full price;

- Having also heard Dr Vassallo’s further arguments that his client faced a dilemma in the sense that according to the same tender document he should either, in terms of 4.2 (b) Technical Offer (Instructions to Tenderers), have to submit a signed declaration form using the format attached to the Tender Submission Form, conscious that he was not at liberty to refrain from giving requested information, while at the same time he would be infringing the tender conditions which also indicated that the price must be submitted in the 3rd Package;
- having also considered Dr. Vassallo’s statement that in his view the remedies to this situation were: to reintegrate his client’s tender in the tender process if it is judged that this disclosure did not prejudice the process but would maintain the same level of competition to the benefit to the contracting authority; the cancellation of the tender because the tender instructions were contradictory and misleading or to engage into a negotiated procedure if it was deemed that delay in awarding the tender could jeopardize EU funds;
- having also noted the rebuttal by Dr. I Gatt of Dr. Vassallo’s arguments that section 2 of the Draft Service Contract ‘Structure of the Contract’ listed in order of precedence the special conditions and annexes and the last sentence stated that ‘In case of any contradiction between the above documents, their provision shall be applied according to the above order of precedence’ where Annex V ‘Budget’ preceded Annex VI ‘Forms and other relevant documents’
- having further heard Dr Gatt contend that these provisions were also reflected in article 4 which in its NB stated that ‘Financial proposals are to be submitted ONLY in package three’ and that this took precedence over the ‘forms’ that were to be submitted and that it was not unheard of that a contract would contain conflicting clauses however, in such cases, the contract itself would provide for its interpretation, Dr Gatt went on to refer to article 4 (iii) of the Instructions to Tenderers which stated ‘Package Three; Completed price schedules and, or bills of quantities ...’;
- having noted the submissions of Dr. A Delia that (i) instead of declaring the price on the relative form in package 2 the tenderer could have opted to indicate on the form that the price was contained in package 3, (ii) section 82 (1) of the Public Contracts Regulations clearly indicated that in the three package system the price had to be given in envelope 3; (iii) even if the Director of Contracts found the appellant’s claim correct that he had participated in other tendering processes and that he had made similar submissions where his offers had not been disqualified, two wrongs did not make a right; (iv) contrary to what the appellant stated, it was admissible to seek a clarification on such a point prior to the closing date of tender and went further to state that such clarifications were an integral part of the tendering process.

reached the following conclusions, namely:

1. The PCAB finds that there is no doubt that a gross error was committed in the drafting and issuing of the Tender Document, an error which conflicted with the very basis of the concept and the mechanism of the three package system

as provided for in the relative legislation and in this respect the competent authorities should ensure that such errors will not be repeated;

2. The fact that according to Dr Vassallo the appellant had faced a dilemma when filling in the forms and only acted in the way he did because on other occasions he had done the same and was not disqualified shows that the company was sufficiently aware of how the three package system works;
3. The reason brought forward that allegedly the same circumstances had occurred previously without the appellant company having been penalized is not sufficient justification to perpetuate an error, the PCAB also notes and agrees that there had been ample time to ensure that the tenderer adopted the correct procedure by seeking a clarification and that there was no reason that precluded him from doing so;
4. The PCAB feels that the Regulations regarding the three package system are very clear and it is also very true that such Regulations supersede any other thing that may be written in a Tender Document, besides which the Board also agrees that there were sufficient warning lights contained within the Tender Document itself to have prompted any prospective tenderer who found himself in doubt to seek to clarify the requirements of the Tender Document;
5. The PCAB also feels that if any of Dr. Vassallo's suggested remedies were to be applied this would act against the other tenderer who had correctly submitted their bid notwithstanding the contradictions in the Tender Document.

As a consequence of (1) to (5) above this Board finds against the appellant Company and declares that the deposit paid in respect of the appeal should be forfeited to Government.

Anthony Pavia
Chairman

Edwin Muscat
Member

Carmelo Esposito
Member

26 May, 2010