

PUBLIC CONTRACTS APPEALS BOARD

Case No. 229

Adv. CT/046/2010; CT/2647/2009

Supply Tender for the Lease of a Temporary Passenger Handling Structure at Cirkewwa Ferry Terminal

This call for tenders was published in the Government Gazette on 9 February 2010. The closing date for this call for offers was 1 April 2010.

The estimated value of this tender was Euro 135,000 (exclusive of VAT).

Three (3) tenderers submitted their offers.

HMK International Ltd filed an objection on the 23 June 2010 following the decision by the Contracts Department to award the tender in caption to *240 Ltd*.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 6 October 2010 to discuss this objection.

Present for the hearing were:

HMK International Ltd (HMK Ltd)

Dr. Charisse Ellul	Legal Representative
Mr Karl Mifsud Cremona	Representative
Mr Patrick Hall	Representative

240 Ltd

Dr John L Gauci	Legal Representative
Mr Desmond Mizzi	Representative
Ms Ilwana Pace	Representative

Transport Malta

Dr Joseph Camilleri	Legal Representative
Mr Chris Farrugia	Senior Manager

Evaluation Board

Mr Maurizio Micallef	Chairperson
Mr Ludwig Xuereb	Secretary

Department of Contracts

Mr Francis Attard	Director General (Contracts)
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After the Chairman’s brief introduction as to how the hearing was going to be conducted the appellant Company’s representatives were invited to explain the motives of the objection.

Dr Charisse Ellul, legal representative of HMK International Ltd, reported that on the 23rd June 2010 her client was informed by the Contracts Department that its bid was unsuccessful because it was not the cheapest technically compliant bid. Contrary to what the Contracts Department had stated, Dr Ellul contended that her client’s offer was, in fact, the cheapest for the following reasons:

- tender condition 12.5 (at page 9) indicated the budget available and that tenderers had to bid for items 1 to 6 as per Annex III;
- condition 11.3 (a) provided that “...The financial bid will include rates for the 2 year lease as well as the possible 6 one-month extensions of the lease and upkeep (this is the period catered for in the budget of the tender as identified in the tender as identified in Annex IIIA and IIIB);
- clause 101 ‘Technical Specifications’ laid down, among other things, that the rate “is to be quoted as a lump sum for the 2 year-period together with a rate for further extensions of 1-month at a time”
- Annex IIIB ‘Financial Offer’, likewise, indicated that lump sums had to be quoted;
- from the published tender award details on the website of the Contracts Department it transpired that 240 Ltd quoted a lump sum for items 1 to 6 of €157,900 against the lump sum of €152,800 quoted by HMK Ltd, namely a difference of €5,100 worked out as follows:

<u>240 Ltd</u>		€	€
Items 1 to 4		134,500	
Item 5 (per month)	€2,900 (x 6 months)	17,400	
Item 6 (per month)	€1,000 (x 6 months)	<u>6,000</u>	
			157,900
<u>HMK Ltd</u>			
Items 1 to 4		145,000	
Item 5 (per month)	€1000 (x 6 months)	6,000	
Item 6 (per month)	€300 (x 6 months)	<u>1,800</u>	
			<u>152,800</u>
	HMK Ltd cheaper by		<u>5,100</u>

Dr Joseph Camilleri, legal representative of Transport Malta, the contracting authority, explained that this was a single package tender and the award was to be given to the cheapest compliant tenderer. He further explained that there were three bidders, namely, *Casapinta Design Group* having been adjudicated administratively non-compliant and the other two bidders, *240 Ltd* and *HMK International Ltd*, having

been found both administratively and technically compliant. As a result, the deciding factor had to be the price.

Dr Camilleri remarked that tenderers were requested to offer a lump sum for the 2-year period together with the rate for further extensions of 1 month at a time. He added that whilst items 1 to 4 of the tender concerned the 2-year lease together with the supply and installation of the structure and its eventual dismantling, item 5 concerned the lease extension for 6 months and item 6 also referred to the 6-month lease but with regard to maintenance and general upkeep of the structure.

Dr Camilleri agreed with Dr Ellul in the sense that 240 Ltd submitted a lump sum for items 1 to 4 and then quoted a separate price for items 5 and 6. At this juncture, Dr Camilleri remarked that, with regards to items 5 and 6 of 240 Ltd, there appeared to be a misunderstanding on the part of the appellants in the sense that the prices displayed on the website and on the notice board for items 5 and 6, i.e. €2,900 and €1,000, were not monthly rates but covered the 6 month period, contrary to what had just been indicated by the appellant company. Dr Camilleri stated that, taking this into account, it would result that the offer made by 240 Ltd amounted to €138,400 against the €152,800 both for items 1 to 6 and excluding VAT. Dr Camilleri remarked that this misunderstanding on the part of the appellants was probably brought about by the way the financial offer was displayed on the notice board and on the website since, through some oversight, the prices of 240 Ltd against items 5 and 6 were quoted as monthly and, as a consequence, the appellants were misled, so much so that Dr Ellul ended up multiplying the amounts by six to cover the 6 month period. Dr Camilleri stated that Transport Malta was not involved in what appeared on the notice board and website of the Contracts Department. The contracting authority's legal representative pointed out that the adjudicating board had worked out the prices in a correct manner as could be seen in the adjudicating report.

Dr Camilleri remarked that although the appellant company had quoted a lump sum for items 1 to 6, enough information was given to arrive at the price offered for items 1 to 4 and, in that way, the contracting authority was able to compare the price for items 1 to 4 of the two compliant bidders, namely 240 Ltd €134,800 and HMK International Ltd €145,000. Dr Camilleri added that the adjudicating board had recommended that the tender be awarded only in respect of items 1 to 4 so that the value of the award would be within the budget (€135,000).

The Chairman PCAB observed that the prices indicated by 240 Ltd in Annex IIIA 'Financial Offer' in respect of items 5 and 6 under column 'unit cost' were €2,900 and €1,000 respectively, which could have well been interpreted as the monthly rate rather than the amount for the whole 6-month period. As a consequence, he asked if any clarification had been sought in this respect.

Dr Camilleri referred to (i) the email dated 20th May 2010 from Transport Malta to 240 Ltd whereby the latter was requested to confirm whether the prices for items 5 and 6 quoted under the column marked 'unit price' referred to the full period of 6 months requested in the tender document and (ii) the reply via an email dated 21 May 2010 whereby 240 Ltd confirmed that the prices of €2,900 and €1,000 covered the 6 month period - last two pages of the evaluation report refer. He added that this clarification was sought following consultations with the Contracts Department and

informed the PCAB that the closing date of tender was the 1st April 2010. Dr Camilleri remarked that, in their tender submission, 240 Ltd had already indicated that the prices quoted for items 5 and 6 covered the full 6 month period but, to clear any doubt, the contracting authority felt that it would be better to clarify this point further.

Dr John Gauci, legal representative of 240 Ltd, remarked that, under the column 'H' 'grand total' of Annex IIIA, his client quoted the price of €3,422 meaning that it covered the 6 month period indicated under column 'B' 'Quantity'.

The Chairman PCAB observed that, with regard to item 6, HMK International Ltd quoted double the amount quoted by 240 Ltd.

Mr Karl Mifsud Cremona, also representing HMK International Ltd, stated that on the 9th of April 2010 he requested a clarification from the Contracts Department as to why his quote was on the basis of items 1 to 6 whereas that of 240 Ltd was based on items 1 to 4 and the only reply he got was that note had been taken of the point raised. Mr Mifsud Cremona also noted that the prices displayed on the Department's notice board, which Dr Camilleri termed as rather misleading, were reproduced in the same manner on the Department's website.

Dr Camilleri replied that the evaluation process was still under way when Mr Mifsud Cremona sent his email in April 2010 and that was why the appellants' request was answered in the sense that note was being taken of its contents for evaluation purposes so much so that the adjudicating board was not misled in that regard.

Dr Gauci intervened to insist that the totals given under column 'H' of Annex IIIA included the full 6 months plus VAT and taxes with regard to all items from 1 to 7. He pointed out that the contracting authority sought a clarification with regard to the prices quoted under column 'H', which in turn referred to the grand total of each item, and not with regard to the prices under column 'D' of Annex IIIA, and his client had confirmed that the prices under column 'H' covered the full 6 month period.

The PCAB expressed a degree of unease with the clarification sought by the contracting authority at the stage that it was made and even with regard to the fact that the contracting authority felt the need to seek a clarification as, in itself, that indicated that the picture was not all that clear.

At this point, following a specific request made by the appellants, the PCAB informed those present that 240 Ltd had submitted its financial offer under 'Option B'. The appellants intervened to note that 240 Ltd had filled in the bill of quantities of Option 'A'.

The contracting authority's representatives intervened to explain that the difference between Option 'A' and 'B' was that one included a raised floor while the other included a concrete platform.

Mr Mifsud Cremona remarked that, according to the Contracts Department's website, 240 Ltd chose Option 'A' whereas its Annex III A was referring to Option 'B'.

Mr Maurizio Micallef, chairman of the adjudicating board, explained that 240 Ltd offered to do Option 'A' or 'B' at the same price. Mr Micallef stated that Annex III was common to both Option 'A' and 'B' as could be seen from that submitted by HMK International Ltd (Option 'A') and 240 Ltd (Option 'B').

Mr Francis Attard, Director General (Contracts), under oath, remarked that, in his view, under column 'D' one should have included the monthly rate and under column 'H' the grand total, however, if something was not clear one had the opportunity to seek a clarification. He added that the answer to the clarification had to be convincing otherwise it could still lead to tender rejection.

The PCAB expressed its discomfort that a clarification had been sought at that stage since that could have induced the bidder to take a commercial risk and confirm that the amount given under column 'D', 'unit cost', was not the monthly rate but covered the entire 6 month period thus, effectively, altering its financial offer.

Mr Attard noted that, at the end of the day, due to budgetary constraints, the tender was going to be awarded for items 1 to 4 only, leaving out items 5 and 6, which were being contested to some extent. In reply to the appellant company's claim that the contracting authority had to award the tender for items 1 to 6 and not for items 1 to 4, Mr Attard quoted clause 7.1 of the 'Instructions to Tenderers':

"This tender procedure is not divided into lots. Tenders must be for the entirety of the quantities indicated. Nevertheless, Government reserves the right of accepting any tender wholly or in part, or of dividing the contract among two or more tenderers."

Dr Camilleri disagreed with the comment that was being made by the appellants in the sense that the 'Instructions to Tenderers' were overridden by the 'Special Conditions' because the 'Special Conditions' went into play after tender award.

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 23 June 2010 and also through their verbal submissions presented during the public hearing held on 6 October 2010 had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellants' representatives' (a) claim that their offer was the cheapest, (b) reference to conditions 12.5, 11.3 (a), clause 101 and Annex IIIB respectively, (c) reference to the fact that their offer was, effectively, €5,100 cheaper in view of the fact that whilst 240Ltd quoted a lump sum for items 1 to 6 of €157,900, they quoted €152,800 and (d) remark that, according to the Contracts Department's website, 240 Ltd chose Option 'A' whereas its Annex III A was referring to Option 'B';
- having also taken note of the contracting authority's (a) explanation as to what the tender document required in terms of quotes to be submitted by the bidders, (b)

remark that , with regards to items 5 and 6 of 240 Ltd, there appeared to be a misunderstanding on the part of the appellants in the sense that the prices displayed on the Department of Contracts’ website and on the same Department’s notice board for items 5 and 6, i.e. €2,900 and €1,000, were not monthly rates but covered the 6 month period, (c) claim that this misunderstanding on the part of the appellants was probably brought about by the way the financial offer was displayed on the notice board and on the website since, through some oversight, the prices of 240 Ltd against items 5 and 6 were quoted as monthly and, as a consequence, the appellants were misled, so much so that Dr Ellul ended up multiplying the amounts by six to cover the 6 month period, (d) claim that that the offer made by 240 Ltd amounted to €138,400 against the €152,800 both foitems 1 to 6 and excluding VAT, (e) contention that Transport Malta was not involved in what appeared on the notice board and website of the Contracts Department and that the adjudicating board had worked out the prices in a correct manner as could be seen in the adjudicating report, (f) remark that although the appellant company had quoted a lump sum for items 1 to 6, enough information was given to arrive at the price offered for items 1 to 4 and, in that way, the contracting authority was able to compare the price for items 1 to 4 of the two compliant bidders, namely 240 Ltd €134,800 and HMKInternational Ltd €145,000, (g) claim that that the adjudicating board had recommended that the tender be awarded only in respect of items 1 to 4 so that the value of the award would be within the budget (€135,000), (h) referencæ to the email dated 20th May 2010 from Transport Malta to 240 Ltd whereby the latter was requested to confirm whether the prices for items 5 and 6 quoted under the column marked ‘unit price’ referred to the full period of 6 months requested in the tender document, (i) reference to reply via an email dated 21 May 2010 whereby 240 Ltd confirmed that the prices of €2,900and €1,000 covered the 6 month period and (j) explanation regarding the difference between Option ‘A’ and ‘B’ which was that one included a raised floor while the other included a concrete platform and that Annex III was common to both Option ‘A’ and ‘B’ as could be seen from that submitted by HMK International Ltd (Option ‘A’) and 240 Ltd (Option ‘B’);

- having taken cognizance of 240 Ltd’s representatives’ (a) claim that under the column ‘H’ ‘grand total’ of Annex IIIA, they quoted the price of €3,422 meaning that it covered the 6 month period indicated under column ‘B’ ‘Quantity’ and (b) reference to the fact that the contracting authority sought a clarification with regard to the prices quoted under column ‘H’, which’ in turn’ referred to the grand total of each item and not with regard to the prices under column ‘D’ of Annex IIIA confirming that the prices under column ‘H’ covered the full 6 month period;
- having also considered the DG Contracts’ evidence, especially, his (a) remark that, whilst, in his view, under column ‘D’ one should have included the monthly rate and under column ‘H’ the grand total, yet, it was equally possible that if something was not clear one had the opportunity to seek a clarification and (b) reference to the fact that , due to budgetary constraints, the tender was going to be awarded for items 1 to 4 only, leaving out items 5 and 6, which were being contested to some extent;

reached the following conclusions, namely:

1. The PCAB expresses a degree of unease with the clarification sought by the contracting authority at the stage that it was made and even with regard to the fact that the contracting authority felt the need to seek a clarification as, in itself, that indicated that the picture was not all that clear.
2. The PCAB feels that such clarification sought by the contracting authority at that stage in the tendering process, despite being acted upon in absolute good faith, could have induced the bidder to take a commercial risk with the latter confirming that the amount given under column 'D', 'unit cost', was not the monthly rate but covered the entire 6 month period thus, effectively, altering its financial offer.

As a consequence of (1) and (2) above this Board, in full consideration of the fact that its decision is solely based on the premise that transparency and good intention is more evidently demonstrated, recommends that this call be re-issued.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

25 October 2010