

Public Contracts Appeals Board

Case No 238

Adv. CT/045/2010 ; CT 2669/2010

Service Tender for the Awareness Raising Campaign for the Dignity of Domestic Violence Survivors Project

This call for tenders was published in the Government Gazette on 9th February 2010. The closing date for this call for offers was 6th April 2010.

The estimated value of this tender was Euro 249,750 excluding VAT

Four (4) tenderers participated in this tender.

BPC International Ltd filed an objection on the 19th July 2010 against the proposed award of this tender to *MPS Marketing Communications Ltd* after being informed that their tender "was not successful as it was not administratively compliant" because they "did not submit accompanying certificate of satisfactory execution for the most important works listed similar to those being requested in the tender dossier, as stipulated in 3(f)1 on page 7."

The Public Appeals Board composed of Mr Edwin Muscat as Chairman and Mr Carmel J Esposito and Mr John Buhagiar as Members convened a public hearing on Friday 29th October 2010 to discuss this objection.

After the Chairman's brief introduction as to how the PCAB was going to conduct the hearing, the appelland company was invited to explain the motives of his objection.

Present

BPC LTD

Mr David Brockdorff	Managing Director
Mr Ramon Naudi	Representative

MPS Marketing Communications Ltd

Dr Adrian Delia	Legal Representative
Dr John Gauci	Legal Representative
Mr Chris Mifsud	Representative

Commission for Domestic Violence

Dr Joanna Xuereb	Chairperson
Mr George Papagiorcopulo	Project Administrator

Adjudicating Board

Dr Marceline Naudi	Chairperson
Ms Doris Vassallo	Member
Mr Godwin Borg	Member
Mr Steve Portelli	Member
Dr Brenda Murphy	Member

Department of Contracts

Mr Francis Attard	Director General (Contracts)
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Mr David Brockdorff , Managing Director of BPC Ltd started by making reference to the Department of Contract's letter dated 9th July 2010, whereby his firm was informed that its offer had been disqualified as it was not administratively compliant since the bid was not accompanied by certificates of satisfactory execution for the most important listed works similar to those being requested in the tender dossier in para 3(f) on page 7. Mr Brockdorff stated that his company had given clear evidence of its technical abilities to carry out works similar to those requested in the tender document. He submitted that his company's offer included a document entitled "Data on Consortium" which listed the various similar works undertaken by the company, which list included EU funded campaigns and government contracts that amply demonstrated that his firm was more than capable of executing this contract. Moreover, Mr Brockdorff contended that his firm had submitted that same kind of documentation when it participated in similar EU and Government funded calls for tenders and that there were occasions when he was awarded contracts. Therefore, he reckoned that in this case there must have been some mistake or oversight on the part of the contracting authority. Mr Brockdorff further complained that no template had been furnished in the tender document laying down the kind of certificate that the contracting authority was after because had that been the case, his firm would have provided the information in the prescribed form. Finally, Mr Brockdorff referred to the Department of Contract's Circular No 11/2010 which provides that in cases of administrative non-compliance, tenders are given the opportunity to rectify their shortcomings. In this case he was not given such opportunity.

In her reply, Dr Marceline Naudi, the chairperson of the Adjudicating Board acknowledged that in their offer BPC Ltd had submitted a list of principal works and services provided by the company, however, appellants failed to submit certificates of satisfactory execution of such works and services. Section 3(f) (1) stated, inter alia, that tenderers must provide evidence of technical abilities by providing a list of principal deliveries effected or main services provided accompanied by certificates of satisfactory execution for the most important works. This latter requirement was ignored by appellants. With regards to the second point raised by Mr Brockdorff, namely that his company had been awarded other contracts with similar documentation, Dr Naudi stated that she was assigned to evaluate this tender and that she was not answerable to what took place in the adjudication of the tenders referred to by the appellant. In an intervention on this point, the Chairman of the Board remarked that the hearing had to deal with this particular tender and that references to other cases were out of place. With regard to Mr Brockdorff assertion that no template

was included in the tender document, Dr Naudi remarked that although no specific template was provided, other tenderers did submit such certificates in the form of letters from their clients indicating that the latter were satisfied with the services they obtained. Finally, Dr Naudi referred to Mr Brockdorff's submission regarding Contract's Circular No 11/2010. She pointed out that the tender was published on 9th February 2010 and therefore it had to be evaluated in accordance with the regulations and procedures applicable at that time. In this regard, the Chairman of the Board pointed out that the Clarification Letter No 2 dated 17th March 2010, states that "No rectification shall be allowed. Only clarification on the submitted information may be requested. This is indicated by the symbol*". He added that this note applied also to the evaluation criteria as per clause 11(e) of the same clarification and that the submission of satisfactory execution certificates was a selection criterion as per clause 3(f) of the tender document

In his intervention, Dr Adrian Delia, legal representative of MPS Marketing Communications Ltd, the recommended tenderer submitted the following remarks

- a) the missing certificates were a mandatory requirement.
- b) there was a difference between the fact that the bidder had executed similar contract which were submitted by the appellant, and the provision of certificates from the clients acknowledging that these contracts were carried out to their satisfaction which were not submitted.
- c) the amendments to the tendering procedure and the subsequent amended regulations laid down that the tenderer would be given the opportunity to rectify his shortcoming only in certain specific instances but he could not submit any document that should have been furnished in the first place with original tender submission.

At this point the hearing was brought to a close.

This Board,

- 1 having noted that the appellants, in terms of their reasoned letter of objection received on the 19th July 2010, and also through their verbal submissions presented during the public hearing held on 29th October 2010, had objected to the decision taken by the General Contracts Committee;
- 2 having taken note of appellant's claims that (a) the company had given clear evidence of its technical abilities to carry out works similar to those requested in the tender document as evidenced by the list of works and services provided in their offer, and (b) that the company had been awarded Government contracts with documents similar to those submitted in this tender offer, and (c) that no format or template for certificates of satisfactory execution of listed works were included in the tender document, and (4) that the company should have been given the opportunity to remedy their offer to be fully compliant in terms of Contracts Circular No 11/2010;

- 3 having considered the points raised by the representative of the contracting authority who (a) confirmed that appellants failed to submit relative certificates which were explicitly required by the Department as such certificates offered comfort that the bidder was capable of offering the required services, and (b) that the Departmental Board was assigned to evaluate this tender so that whatever decisions were taken on other tenders were of no concern to their (Departmental) Board, and (c) confirmed that no specific templates for such certificates were included in the tender document, however, other bidders forwarded copies of letters from their clients indicating that the latter were satisfied with the works provided by the relative contractors, and (d) pointed out that whereas the tender document was published on the 9th February 2010, Contracts Circular No 11/2010 was issued on 16 April 2010. In the circumstances, the Adjudicating Board evaluated the offers in accordance to the regulations and procedures applicable at the time;
- 4 having also taken note of the intervention made by Dr Adrian Delia on behalf of MPS Marketing Communications Ltd who submitted that (a) the missing certificates were mandatory and (b) there is a difference between the execution of contracts and certification that works were carried out satisfactorily, and (c) Contract Circular No11 of 2010 provided for the rectification of offers only in specific instances but certainly not in this instance, when missing documents should have been furnished with original tender submission;

reached the following conclusion:

- 1 Appellants failed to submit relative documents in spite of the fact that their submission was mandatory.
- 2 The submission of the document “Data on Consortium” could be said to confirm that the company was capable but the failure of the bidder to submit the certificates of satisfactory execution left the Department without the comfort that it was seeking.
- 3 Appellant’s claim that Contract’s Circular No 11/2010 allows for the rectification of the shortcoming of his offer is not correct because the provision of the missing documents was mandatory and should have been furnished together with original offer.

As a consequence of points 1 to 3 above, this Board finds against the appellant.

In view of the above and in terms of the Public Contracts Regulations 2005, this Board recommends that the deposit submitted by the said appellant should not be reimbursed.

Edwin Muscat
Chairman

Carmelo J Esposito
Member

John Buhagiar
Member

6 November 2010