

PUBLIC CONTRACTS APPEALS BOARD

Case No. 252

CT 3029/2010 – Service Tender for the Provision of a Training Needs Analysis for MCAST Staff

This call for tenders was published in the Government Gazette on 12th March 2010. The closing date for this call for offers with a department estimate of €60,000 (excl. VAT) was 4th May 2010.

Six (6) tenderers had originally submitted their offers

EMCS Ltd filed an objection on 29th October 2010 against the decision by the Contracts Department to disqualify its offer as administratively non-compliant and to recommend the award of tender to PriceWaterHouseCoopers.

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 Friday, 21st January 2011 to discuss this objection.

Present for the hearing were:

EMCS Ltd

Dr Adrian Delia	Legal Representative
Dr John L Gauci	Legal Representative
Mr Adrian Said	Representative
Mr Matthew Castillo	Representative

PriceWaterHouseCoopers

Mr Lino Casapinta	Representative
Ms Claudine Attard	Representative

MCAST

Dr Peter Caruana Galizia	Legal Representative
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Evaluation Board

Mr Anthony Saliba	Chairman
Ms Crisania Gatt	Secretary
Ing Vince Maione	Member
Mr Donald Friggieri	Member
Ms Veronica Sultana	Member

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

Dr Adrian Delia, legal representative of EMCS Ltd, the appellant company, stated that his client received a letter dated 20th October 2010 from the Contracts Department informing it that its offer had been disqualified as it was considered administratively non-compliant since the old 'tender form' was submitted instead of the reviewed 'tender form'.

The same lawyer declared that his client had properly filled in and submitted the 'tender form' that formed part of the published tender document.

The appellant company's legal advisor explained that one had to note that it was decided that similar tender forms should be amended as part of the exercise that was under way to review certain aspects of the public procurement procedure. Dr Delia contended that one could not amend the 'tender form' by way of a clarification and he even argued that if other tenderers submitted a 'tender form' other than that forming part of the published tender document then those tender submissions were not in order.

Dr Delia maintained that the information requested in the amended (new) tender form had been given by his client in the 'old' version of the 'tender form' and elsewhere in the company's tender submission as detailed in his reasoned letter of objection dated 29th October 2010.

Dr Peter Caruana Galizia, legal representative of MCAST, the contracting company, declared that he was in an awkward position trying to defend this case when the contracting authority that he represented had, in the first place, recommended that the tender be awarded to the appellant company, EMCS Ltd, notwithstanding that it, along with APS Consult Ltd, had submitted the old 'tender form' published in the tender document.

At this stage reference was made to the first evaluation report dated 22nd June 2010, which recommended that the tender be awarded to EMCS Ltd, an extract of which read as follows:

"The Evaluation Committee used the Administrative Schedule attached in Annex C to assess the compliance of each of the tenders with the essential requirements of the tender dossier.

The requirements of the tender dossier are listed in the Instructions to Tenderers. When Clarification letter no 1, dated 27 April 2010, was issued by the Department of Contracts to all prospective bidders, the new Tender Form was attached. It was noted that under clause 11 of the said clarification letter these new additional submissions were introduced:

11 (d) Technical Capacity:

- General information about the tenderer;*
- A list of the staff proposed for the execution of the contract, with the CVs of key experts staff;*
- A list of the principal deliveries effected or the main services provided,*

similar to those being requested in the tender dossier, over the past three years, accompanied by certificates of satisfactory execution for the most important works.

The above documentation was not required in the Instructions to Tenderers. Therefore, in view of the discrepancy between the two documents, the Evaluation Committee agreed that the above requirements are not to be considered.

Furthermore the Evaluation Committee would like to point out that two tenderers namely Tenderer No 3, APS Consult Ltd and Tenderer No 4, EMCS Ltd, both submitted the version originally published with the tender dossier of the Service Tender Submission Form. The Committee is of the opinion that both Tenderers should not be excluded on administrative grounds for the following reasons:

- *The reference in Clarification Letter No 1 which states that Tender Form "is to replace the Tender Form in Part D of the published tender document", is misleading because no such part D appears in the published tender dossier;*
- *Notwithstanding the above point, the Evaluation Committee feels that this issue is of no consequence.*

On the basis of this, the Evaluation Committee decided that all six tenderers were all administratively compliant and should be considered further."

Dr Caruana Galizia stated that it was only after the intervention of the Contracts Department that the initial decision had to be reviewed in the sense that both EMCS Ltd and APS Consult Ltd had to be disqualified once they had filled in the old tender form – as per email dated 26th August 2010.

Mr Anthony Caruana, chairman of the evaluation board, remarked that acting on the instructions issued by the Contracts Department, another evaluation report was drawn up and referred to the Contracts Department on the 5th October 2010 wherein EMCS Ltd and APS Consult Ltd were disqualified for having submitted the old 'tender form' and the tender was recommended for award to PriceWaterHouseCoopers.

During the hearing it was emphasised that the date of issue of tender was the 12th March, the clarification date was the 27th April and the closing date of tender was the 4th May 2010.

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 29th October 2010 and also through their verbal submissions presented during the hearing held on 21st January 2011, had objected to the decision taken by the pertinent authorities;

- having noted the appellant company's representatives' reference to the fact that (a) the company had received a letter dated 20th October 2010 from the Contracts Department informing it that its offer had been disqualified as it was considered administratively non-compliant since the old 'tender form' was submitted instead of the reviewed 'tender form', (b) the company had properly filled in and submitted the 'tender form' that formed part of the published tender document, (c) one could not amend the 'tender form' by way of a clarification and (d) the information requested in the amended (new) 'tender form' had been given by the company in the 'old' version of the 'tender form' and elsewhere in the company's tender submission as detailed in his reasoned letter of objection dated 29th October 2010;
- having considered the contracting authority's legal representative's (a) declaration that he was in an awkward position trying to defend this case when the contracting authority that he represented had, in the first place, recommended that the tender be awarded to the appellant company notwithstanding that it had submitted the old 'tender form' published in the tender document, (b) claim that it was only after the intervention of the Contracts Department that the initial decision had to be reviewed in the sense that the appellant company had to be disqualified once it had filled in the old 'tender form' and (c) reference to the fact that, acting on the instructions issued by the Contracts Department, another evaluation report was drawn up and referred to the Contracts Department on the 5th October 2010 wherein the appellant company was disqualified for having submitted the old 'tender form' and the tender was recommended for award to PriceWaterHouseCoopers,

reached the following conclusions, namely:

1. The Public Contracts Appeals Board acknowledges that the company had properly filled in and submitted the 'tender form' that formed part of the tender document as originally published by the contracting authority.
2. The Public Contracts Appeals Board recognises that, regardless, in this instance, the appellant company's bid, as originally submitted, still contained all the information required in the amended 'tender form' and, as a result, albeit the format may have been different, the content was still very relevant and fully in line with the contracting authority's request.
3. The Public Contracts Appeals Board feels that, following the publication of a call, a contracting authority cannot amend a 'tender form' by way of a simple clarification. This Board cannot agree to an ill-timed creation of a precedent which could somehow damage participants who would have entered the competitive process in good faith and, possibly, already submitted the document at that point in time. Undoubtedly, one cannot expect to recognise a possible scenario wherein tenderers who would have already submitted the document could be given the chance to retrieve their bid from the tender box in order to re-open their offer and fill in the data in the new 'tender form'.

In view of the above, this Board finds in favour of the appellant company and also recommends that the deposit paid by the appellants should be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

16 February 2011