

PUBLIC CONTRACTS APPEALS BOARD

Case No. 262

CT/2734/2009 Adv No CT/064/2010

Service Tender for the Supply, Delivery, Installation and Commissioning of various Lecture/Tutorial Room Furniture, Seating and Equipment for the Junior College Building Extension at the University of Malta

This call for tenders was published in the Government Gazette on 26th February 2010. The closing date for this call with a department estimate of € 140,207.45 (Lot no. 1) was 20th April 2010.

Twelve (12) tenderers submitted their offers.

Messrs Krea (Malta) Ltd filed an objection on 20th December 2010 against the decisions by the Contracts Department to disqualify its offer on being found administratively non-compliant and to recommend award to FX Borg Furniture Ltd.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Carmel Esposito and Mr. Joseph Croker as members convened a public hearing on Wednesday, 23rd February 2011 to discuss this objection.

Present for the hearing were:

Krea (Malta) Ltd

Dr William Chetcuti	Legal Representative
Mr Chris Gauci	Representative
Ms Marthese Aquilina	Representative

FX Borg Furniture Ltd (FXB Ltd)

Mr Joe Borg	Representative
Ms Jenny Cassar	Representative

University of Malta

Evaluation Committee

Mr Tonio Mallia	Chairman
Ms Sonia Zammit	Secretary

Department of Contracts

Mr Francis Attard	Director General
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After the Public Contracts Appeals Board Chairman's brief introduction, the appellant Company was invited to explain the motives of its objection.

Dr William Chetcuti, legal representative of Krea (Malta) Ltd, stated that in an email dated 15th December 2010 sent by the Contracts Department and which was received by his client, the latter was informed that (i) its tender submission was found non-compliant since it did not include the revised *Supplies Tender Form* which was issued by the Department of Contracts in a Clarification Note No. 1 dated 25th March 2010 and (ii) lot 1 of the tender was recommended for award to FXB Ltd for the total price of €126,635.98 excluding VAT. Dr Chetcuti maintained that, apart from being compliant, his client had offered to supply these goods for the price of €76,824.04, excluding VAT.

Dr Chetcuti contended that an amendment to the original tender document, as was the replacement of the original tender form with a new tender form, could not take effect simply by way of a clarification note. He further claimed that all the information requested in the new tender form had been submitted by his client in the company's tender submission as explained in its letter of objection and, quoting from a previous case decided upon by the Public Contracts Appeals Board, Dr Chetcuti stated that once all the information requested had been furnished then his client's offer should not have been rejected.

At this point Dr Chetcuti questioned whether his client would have been disqualified had he deposited the tender submission before the date the clarification note was sent by the Contracts Department, i.e. prior to the 25th March 2010.

Mr Tonio Mallia, Chairman of the Evaluation Committee, made the following remarks:

- the cheapest tender was that submitted by tenderer no. 13, C. Fino & Sons Ltd, at €68,414.14;
- the clarification note was displayed on the website;
- at the time that the new tender form was issued by the Department of Contracts the University of Malta had four other tenders in the process;
- thirteen bidders participated in the tendering process of whom twelve bidders submitted offers for lot no. 1;
- lot no. 2 could not be awarded as no suitable bids were submitted and this lot was recommended for re-issue as two departmental tenders;
- the first evaluation report dated 7th July 2010 was reviewed and resubmitted to the Contracts Department on the 2nd August 2010 wherein the Evaluation Committee (a) remarked that *“Following a detailed discussion, the Board agreed that both forms required exactly the same information. The Board also noted that all the relevant and necessary information requested in the tender document and on this same form, was duly provided and submitted by all the tenderers and therefore the Board decided to accept*

these offers and continued the administrative evaluation” and (b) recommended that lot no. 1 be awarded to tenderer no. 13, C. Fino & Sons Ltd, who, in the opinion of the Evaluation Committee, was the cheapest compliant bidder at €68,414.14, excluding VAT;

- the General Contracts Committee on the 10th August 2010 disagreed with the Evaluation Committee that there was no difference between the old and the new tender form and pointed out that the new tender form was communicated to tenderers through a clarification note on the 25th March 2010 and, as a consequence, asked the Evaluation Committee to review its conclusions;
- by way of an email dated 17th August 2010, the Chairman of the Evaluation Committee informed the Department of Contracts that the committee had discussed the matter and decided to stick to its initial decision thereby accepting those bids with the old tender form as the difference between the old and the new tender forms was deemed irrelevant, especially due to time constraints with regard to the supply of the goods for the new academic year and the risk of losing EU funding;
- given the disagreement between the Evaluation Committee and the General Contracts Committee, the matter was referred to the Minister of Finance, the Economy and Investment in terms of Reg. 7 (1) (b) (ii) of the Public Contracts Regulations, who stood by the stand taken by the General Contracts Committee and the Evaluation Committee was informed that *“it has no discretion on the way it can evaluate the offers. The Evaluation Committee is expected to evaluate the offers strictly in line with the published tender specifications and conditions. Thus the Evaluation Committee is kindly requested to review the conclusions of the Evaluation Report”*;
- in view of these Ministerial instructions, the Evaluation Committee reviewed its recommendations and ended up recommending award of lot no. 1 to FXB Ltd as the only administratively and technically compliant offer for the price of €126,635.98 excluding VAT.

In conclusion Dr Chetcuti remarked that, during 2010, new procedures were introduced with a view to streamlining and ameliorating procedures and not to punish bidders unnecessarily. Dr Chetcuti reiterated his legal argument that one could not introduce an amendment to the tender document by a clarification and he pointed out that the appellant company was the only bidder that lodged an appeal.

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 20th December 2010 and also through their verbal submissions presented during the hearing held on 23rd February 2011, had objected to the decision taken by the pertinent authorities;

- having noted the appellant company's representatives' reference to the fact that (a) its tender submission was found non-compliant since it did not include the revised *Supplies Tender Form* which was issued by the Department of Contracts in a Clarification Note No. 1 dated 25th March 2010, (b) lot 1 of the tender was recommended for award to FXB Ltd for the total price of €126,635.98, excluding VAT with appellant company placing emphasis on the fact that, apart from being compliant, it had offered to supply these goods for the price of €76,824.04, excluding VAT, (c) an amendment to the original tender document, as was the replacement of the original tender form with a new tender form, could not take effect simply by way of a clarification note and (d) all the information requested in the new tender form had been submitted in the company's tender submission;
- having considered the contracting authority's representative's reference to the fact that (a) the cheapest tender was that submitted by tenderer no. 13, C. Fino & Sons Ltd, at €68,414.14, (b) the clarification note was displayed on the website, (c) the first evaluation report dated 7th July 2010 was reviewed and resubmitted to the Contracts Department on the 2nd August 2010 wherein the Evaluation Committee (1) remarked that *“Following a detailed discussion, the Board agreed that both forms required exactly the same information. The Board also noted that all the relevant and necessary information requested in the tender document and on this same form, was duly provided and submitted by all the tenderers and therefore the Board decided to accept these offers and continued the administrative evaluation”* and (2) recommended that lot no. 1 be awarded to tenderer no. 13, C. Fino & Sons Ltd, who, in the opinion of the Evaluation Committee, was the cheapest compliant bidder at €68,414.14, excluding VAT, (d) the General Contracts Committee on the 10th August 2010 disagreed with the Evaluation Committee that there was no difference between the old and the new tender form and pointed out that the new tender form was communicated to tenderers through a clarification note on the 25th March 2010 and, as a consequence, asked the Evaluation Committee to review its conclusions, (e) by way of an email dated 17th August 2010, the Chairman of the Evaluation Committee informed the Department of Contracts that the committee had discussed the matter and decided to stick to its initial decision thereby accepting those bids with the old tender form as the difference between the old and the new tender forms was deemed irrelevant, especially due to time constraints with regard to the supply of the goods for the new academic year and the risk of losing EU funding, (f) given the disagreement between the Evaluation Committee and the General Contracts Committee, the matter was referred to the Minister of Finance, the Economy and Investment in terms of Reg. 7 (1) (b) (ii) of the Public Contracts Regulations, who stood by the stand taken by the General Contracts Committee and the Evaluation Committee was informed that *“it has no discretion on the way it can evaluate the offers. The Evaluation Committee is expected to evaluate the offers strictly in line with the published tender specifications and conditions. Thus the Evaluation Committee is kindly requested to review the conclusions of the Evaluation Report”* and (g) in view of these Ministerial instructions, the Evaluation Committee reviewed its recommendations and ended up recommending award of lot no. 1 to FXB Ltd as the only administratively and technically compliant offer for the price of €126,635.98 excluding VAT;

- having deliberated on the query made by the appellant company's representative as to whether the company would have been disqualified had it deposited the tender submission before the date the clarification note was sent by the Contracts Department, i.e. prior to the 25th March 2010;

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 that, apart from the deposit paid by the appellants being reimbursed, this Board also recommends that the appellants' bid be reintegrated in the evaluation process.

Alfred R Triganza
Chairman

Carmel J Esposito
Member

Joseph Croker
Member

7 March 2011