

## PUBLIC CONTRACTS REVIEW BOARD

### Case No. 305

#### MRRA/W/60/2010/82/Vol 1

#### **Tender for the Supply and Delivery of Tables and Chairs (Lot 1) required for Catering Modules in Merchants Street, Valletta**

This call for tenders was published in the Government Gazette on 19<sup>th</sup> November 2010. The closing date for this call with an estimated budget of € 28,800 was 10<sup>th</sup> December 2010.

Seven (7) tenderers submitted their offers.

Messrs Rausi Co Ltd filed an objection on 17<sup>th</sup> May 2011 against the decision by the Ministry for Resources and Rural Affairs to disqualify its tender for being administratively non-compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Edwin Muscat and Mr Carmel Esposito as members convened a public hearing on Friday, 17<sup>th</sup> June 2011 to discuss this objection.

Present for the hearing were:

#### **Messrs Rausi Co. Ltd**

Dr Antonio Tufigno	Legal Representative
Mr John Rausi	Representative
Ms Jackie Borg Cardona	Representative

#### **KREA Malta Ltd**

Ms Emma Fenech Cefai	Representative
Ms Marthese Aquilina	Representative

#### **Ministry for Resources and Rural Affairs (MRRA)**

Dr Victoria Scerri	Legal Representative
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#### **Evaluation Board:**

Arch Norbert Gatt	Chairman
Mr Saviour Sciberras	Member
Mr Romwald Lungaro Mifsud	Member
Arch. Chanelle Busutil	Member
Ms Sandra Gauci Frendo	Secretary

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

Dr Antonio Tufigno, legal representative of Rausi Ltd, the appellants, stated that by letter dated 10<sup>th</sup> May 2011, the Ministry for Resources and Rural Affairs informed his client that the company's offer was found to be administratively not compliant because no samples were received as per clause 1.2.10.

Dr Tufigno made the following submissions:-

a. Sub-clause 1.2.10 stated that:

*“Tenderers quoting for items in Lot 1 are requested to submit with their tender offer samples of the items being offered, as specified under clauses 7.3.1 and 7.4.1 included in this tender document. Failure to comply with this clause shall render the Tender offer null.”*

- b. from the outset one had to note that clauses 7.3.1 and 7.4.1 did not feature at all in the tender document and it would seem that instead the drafters of the tender document meant to make reference to clauses 8.3.1 and 8.4.1 and, as a consequence, the reason cited for the rejection of his client's offer did not legally stand as it was based on inexistent sub-clauses;
- c. the statement *“No samples submitted”* was incorrect because his client had in fact provided all the samples requested on time as per receipt dated 10<sup>th</sup> December 2010 issued by a representative of the Contracts and Procurement Section, Works Division, the Ministry for Resources and Rural Affairs and countersigned by Ms Jackie Borg Cardona, his client's representative. The same Ministry for Resources and Rural Affairs representative even signed the inventory list of the samples delivered;
- d. his client's representative had called at the Ministry for Resources and Rural Affairs in Floriana to deposit the offer and to deliver the samples and she had been directed by the same Ministry representatives to deposit the samples in Floriana;
- e. on the 17<sup>th</sup> March, 2011, the Contracts and Procurement Section of the Ministry for Resources and Rural Affairs had asked his client whether the company's representatives wished to extend the validity of the offer at the quoted rates up till the end of June 2011, which request was complied with;
- f. he contended that the offer submitted by his client was technically compliant and cheaper than that of the recommended tenderer.

On his part Architect Norbert Gatt, chairman of the evaluating board, claimed that:

- i. as per clause 2.1.1, on submitting its bid, the tenderer accepted in full the content of the tender document, including clarifications, and although there was the opportunity to request clarifications on the tender document none were submitted by the appellant

company;

- ii. the legal argument put forward by the appellant company that the tender was null since clauses 7.3.1 and 7.4.1 that dealt with the samples did not, in fact, feature in the tender document, would have been valid in its case had it not submitted any samples but, once it did submit the samples, then it was clear that the appellant company had sorted out the mix-up or misprint of clauses 8.3.1 and 8.3.4 with 7.3.1 and 7.3.4 without the need for one to ask for any clarification thereon. Still, Architect Gatt acknowledged that the tender document did not contain clauses 7.3.1 and 7.4.1;
- iii. the tender document clearly indicated at clause 8.4.1 that the samples were to be delivered at the *Rehabilitation Projects Office, 210 Republic Street, Valletta*, and, as a result, in terms of this provision, the appellant had delivered the samples at the wrong place and it was the tenderer's responsibility to deliver the samples at the place indicated;
- iv. the evaluation board met at the *Rehabilitation Projects Office in Valletta* where it was provided with all the paper work and where all the relative samples had to be delivered by the bidders;
- v. by letter dated 30<sup>th</sup> May 2011 the Ministry for Resources and Rural Affairs had informed the appellant company that the evaluation board had also indicated in its evaluation report that the company's appointed representative had not filled in the 'Tender Form' properly as required in bold print in clause 2.9.4, which shortcoming, admittedly, had not been communicated to the appellant in the letter of rejection dated 10<sup>th</sup> May 2011. The purpose of informing the appellant company, even if belatedly, was to give it the opportunity to reconsider its appeal in the light of the 'tender form' issue, which was a mandatory requirement. The tender document requested a 'tender form' for each option whereas the appellant company submitted one tender form for its options;
- vi. the evaluation board had nothing to do with the receipt issued for the samples delivered in the Ministry for Resources and Rural Affairs Floriana;
- vii. the adjudication itself did not take long to carry out but these works were subject to the approval of the relative application by the Malta Environment and Planning Authority; and
- viii. at that stage, the contracting authority was not aware of the price quoted by the appellant company as it was found non-compliant at the administrative stage.

The Chairman of the Public Contracts Review Board remarked that the appeal had to deal with the non-submission of samples, which was the reason for rejection communicated to the appellant company and that any other issue had nothing to do with this particular appeal, if anything, they would be the subject of future appeals.

Dr Tufigno requested that this tendering process be cancelled and the tender re-issued in view of the fact that the contracting authority looked set to disqualify his client at a later stage on the issue of the 'tender form'. Dr Tufigno stated that it was unfair for the bidder to be disqualified for the least deficiency in this tender submission when, at the same time, the contracting

authority could get away with gross shortcomings in the presentation of the tender document.

Architect Chanelle Busuttill, a member of the evaluation board, remarked that the Ministry for Resources and Rural Affairs received numerous samples at its Floriana office and that it was standard practice to issue a receipt on the delivery of samples at any section/department of the Works Division. She added that, in this instance, the tender document specified that the samples had to be delivered at the *Rehabilitation Projects Office in Valletta* simply because the evaluation exercise was going to be carried out at that Office.

The Chairman of the Public Contracts Review Board, albeit he personally agreed that the responsibility to submit a tender submission according to tender conditions rested with the bidder, yet the contracting authority had the duty to issue a tender document with matching cross references. He also observed that, in its letter of objection, the appellant company had not requested the cancellation of the tender but that its offer ought to be reinstated in the tendering process.

Ms Jackie Borg Cardona, another representative of the appellant company, remarked that when she had contacted the Ministry for Resources and Rural Affairs's Contracts Section in Floriana with a view to withdrawing the samples, which were valued at €1,156, she was informed that the tender was still under evaluation and hence the samples could not be withdrawn.

Dr Victoria Scerri, legal representative of the contracting authority, stated that the tenderer had to deliver the samples at the specified site and that the clerk receiving the samples should not be expected to verify against each and every tender document whether those samples were to be delivered at that site or somewhere else. She added that, although the tender document ought to be issued in order, still, in case of an ambiguity, the bidder could have had recourse to a clarification. Dr Scerri argued that, once the appellant company was requesting the reinstatement of its bid in the tendering process then it followed that the said company was acknowledging that the tendering process was not an irregular one.

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 17<sup>th</sup> May 2011 and also through their verbal submissions presented during the hearing held on 17<sup>th</sup> June 2011, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representatives' claims and observations, particularly, the references made to the fact that (a) from the outset one had to note that clauses 7.3.1 and 7.4.1 did not feature at all in the tender document and it would seem that instead the drafters of the tender document meant to make reference to clauses 8.3.1 and 8.4.1 and, as a consequence, the reason cited for the rejection of the appellant company's offer did not legally stand as it was based on inexistent sub-clauses, (b) the statement "*No samples submitted*" was incorrect because the appellant company had, in fact, provided all the samples requested on time as per receipt dated 10<sup>th</sup> December 2010 issued by a representative of the Contracts and Procurement

Section, Works Division, the Ministry for Resources and Rural Affairs and countersigned by Ms Jackie Borg Cardona, the appellants' representative whilst the same Ministry for Resources and Rural Affairs' representative even signed the inventory list of the samples delivered, (c) the appellant company's representative had called at the Ministry for Resources and Rural Affairs in Floriana to deposit the offer and to deliver the samples and she had been directed by the same Ministry representatives to deposit the samples in Floriana, (d) the offer submitted by the appellant company was technically compliant and cheaper than that of the recommended tenderer, (e) the appellant company requested that this tendering process be cancelled and the tender re-issued in view of the fact that the contracting authority looked set to disqualify the said appellant at a later stage on the issue of the 'tender form', (f) it was unfair for the bidder to be disqualified for the least deficiency in this tender submission when, at the same time, the contracting authority could get away with gross shortcomings in the presentation of the tender document and (g) the appellant company's representative, Ms Borg Cardona, remarked that when she had contacted the Ministry for Resources and Rural Affairs's Contracts Section in Floriana with a view to withdrawing the samples, which were valued at €1,156, she was informed that the tender was still under evaluation and hence the samples could not be withdrawn;

- having considered the contracting authority's representative's reference to the fact that (a) as per clause 2.1.1, on submitting its bid, the tenderer accepted in full the content of the tender document, including clarifications, and although there was the opportunity to request clarifications on the tender document none were submitted by the appellant company, (b) the legal argument put forward by the appellant company that the tender was null since clauses 7.3.1 and 7.4.1 that dealt with the samples did not, in fact, feature in the tender document, would have been valid in its case had it not submitted any samples but, once it did submit the samples, then it was clear that the appellant company had sorted out the mix-up or misprint of clauses 8.3.1 and 8.3.4 with 7.3.1 and 7.3.4 without the need for one to ask for any clarification thereon, (c) the tender document did not contain clauses 7.3.1 and 7.4.1, (d) the tender document clearly indicated at clause 8.4.1 that the samples were to be delivered at the *Rehabilitation Projects Office, 210 Republic Street, Valletta*, and, as a result, in terms of this provision, the appellant had delivered the samples at the wrong place and it was the tenderer's responsibility to deliver the samples at the place indicated, (e) the evaluation board met at the *Rehabilitation Projects Office in Valletta* where it was provided with all the paper work and where all the relative samples had to be delivered by the bidders, (f) by letter dated 30<sup>th</sup> May 2011 the Ministry for Resources and Rural Affairs had informed the appellant company that the evaluation board had also indicated in its evaluation report that the company's appointed representative had not filled in the 'Tender Form' properly as required in bold print in clause 2.9.4 – the tender document requested a 'tender form' for each option whereas the appellant company submitted one tender form for its options - which shortcoming, admittedly, had not been communicated to the appellant company in the letter of rejection dated 10<sup>th</sup> May 2011 and (g) the evaluation board had nothing to do with the receipt issued for the samples delivered in the Ministry for Resources and Rural Affairs Floriana,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that the appeal had to deal with the non-submission of samples, which was the reason for rejection communicated to the

appellant company and that any other issue had nothing to do with this particular appeal, if anything, such issue/s would be the subject of future appeals if felt necessary.

2. The Public Contracts Review Board argues that it is true that the responsibility to submit a tender according to tender conditions rested with the bidder. Nevertheless, the same Board also feels that a contracting authority had the duty to issue a tender document with no mistakes in it such as unmatchable cross references.
3. The Public Contracts Review Board contends that the samples, albeit taken to the wrong place, were still submitted to the contracting authority so much so that one of the latter's officials accepted these samples for which a receipt was issued by a representative of the Contracts and Procurement Section, Works Division, the Ministry for Resources and Rural Affairs and countersigned by Ms Jackie Borg Cardona, the appellants' representative whilst the same Ministry for Resources and Rural Affairs' representative even signed the inventory list of the samples delivered and this notwithstanding that no such official was authorised to accept such samples in that location. Furthermore, this Board cannot overlook the fact that the appellant company's representative, Ms Borg Cardona, remarked that when she had contacted the Ministry for Resources and Rural Affairs's Contracts Section in Floriana with a view to withdrawing the samples, which were valued at €1,156, she was informed that the tender was still under evaluation and hence the samples could not be withdrawn which goes to show that, albeit the evaluation board were not aware of the said samples and they had nothing to do with the receipt issued for the samples delivered in the Ministry for Resources and Rural Affairs Floriana, yet, in similar circumstances, one would have expected that better internal communication amongst the contracting authority's officials could have taken place.
4. This Board recognizes the fact that the tender document clearly indicated at clause 8.4.1 that the samples were to be delivered at the *Rehabilitation Projects Office, 210 Republic Street, Valletta* but a simple remedy for this oversight could have been found with the contracting authority official informing the appellant company's representative that the samples had to be taken somewhere else saving the day for the latter enabling the company's representative to proceed to the right location to submit the samples in question. Undoubtedly, the fact that such samples were accepted by the authority's official ended up confusing the entire process.

In view of the above this Board finds in favour of the appellant company and recommends that the said tenderer be reinstated in the evaluation process as well as recommending that the deposit paid by the latter should be reimbursed.

Alfred R Triganza  
Chairman

Edwin Muscat  
Member

Carmel Esposito  
Member

4 July 2011

