

PUBLIC CONTRACTS REVIEW BOARD

Case No. 308

MCST 19/2011

Tender for the Provision of Publicity Services for the Manufacturing Research Platform Project – Lots 4 and 5

This call for tenders was published in the Government Gazette on the 22nd February 2011. The closing date for this call with an estimated budget of € 27,500 (exclusive of VAT) was the 18th March 2011.

Nine (9) tenderers submitted their offers.

Outlook Coop filed an objection on 20th April 2011 against the decision taken by the Evaluation Committee's to consider their bid as being non-compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Edwin Muscat and Mr Joseph Croker as members convened a public hearing on Friday, 6th July 2011 to discuss this objection.

Present for the hearing were:

Outlook Coop

Mr Godfrey Kenely	Manager
Mr Hilary Caruana	Representative

Knowledge Innovation Centre

Dr. Justin Fenech	Representative
Mr. Joe Farrugia	

Malta Council for Science and Technology

Dr John Cremona	Legal Representative
Mr Eric Flask	Representative

Evaluation Board

Ms Martina Eggert	Chairperson
Mr Joe Borg Camilleri	Secretary
Mr Jonathan Borg	Evaluator

After the Chairman's brief introduction, the appellant's representatives were invited to explain the motive/s of their objection.

Mr Godfrey Kenely, representing Outlook Coop, the appellant, started by making reference to the Department of Contracts' e-mail dated 15 April 2011 whereby they were provided with three reasons as to why their tender was deemed to be administratively not compliant.

With regard to the issue of '*Documentation related to Form 2 missing*', Mr Kenely said that this form referred to the '*Power of Attorney*' with the said appellant's representative claiming that the company had clearly indicated in the signed 'tender form' that the '*Power of Attorney (Not applicable)*'. Mr Kenely contended that the '*Power of Attorney*' was not applicable for their bid because they were not forming a joint venture/ consortium.

As regards the second issue, namely, '*No details regarding subcontracting*', the appellant's representative said that in the signed 'tender form' they clearly indicated '*Sub-contracting (not applicable)*' and the reason for this was that they were not subcontracting any part of the bid or any part of the Lots.

As far as the third reason was concerned, that is '*Tender Form supplied not in the requested wording*', Mr Kenely said that due to the fact that the 'form' was available only in PDF format they had to recreate it in word format and included the wording accordingly and as applicable. He said that they had included all the clauses.

The appellant's representative said that, on the basis of what had been stated till then, they considered their bid to be fully compliant.

Dr John Cremona, legal representative of the Malta Council for Science and Technology, the contracting authority, replied by confirming that the appellant company's bid was not deemed to be compliant for the reasons mentioned by Mr Kenely. He sustained that there were minor and substantial discrepancies between the 'Tender Form' submitted by Outlook Coop and that included in the 'Tender Dossier'. At this point he made reference to Clause 10.3 of the Instruction to Tenderers which specifically stated that:

'The tenderer must provide all documents required by the provisions of the tender document. All such documents, without exception, must comply strictly with these conditions and provisions and contain no alterations made by the tenderer.'

When asked by the Public Contracts Review Board to state whether the appellant had made any alterations, Dr Cremona replied by stating that they had listed various anomalies and missing items between 'Tender Form' in the 'Tender Dossier' and that submitted by Outlook Coop. These lists were subsequently forwarded to the Public Contracts Review Board and the appellant's representatives.

Mr Joe Borg Camilleri, Secretary, Evaluation Board, said that they had listed fifteen anomalies and five missing items in Outlook Coop's 'Tender Form'.

He explained that (a) in spite of the fact that this was a 'Services' and not a 'Supplies' Tender, (b) the appellant wrote '*The following Supplies*' instead of '*The following Services*', (c) the appellant referred to the Malta Council for Science and Technology as the '*Central Government Authority*' instead of the '*Contracting Authority*', (d) the appellant wrote '*The*

price of our tender’ instead of *‘The total price of our tender’*. On this last point raised Dr Cremona claimed that the ‘price’ was an essential criterion in the adjudication of the said tender and that the wording used could be interpreted to mean that the price might change.

Mr Borg Camilleri said that under Clause 12 of the Tender Form it was stipulated that:

‘I acknowledge that the Contracting Authority shall request rectifications in respect of incomplete/ non-submitted information pertinent to the documentation listed in Clause 11 (a) and 11 (b) of this Tender Form.’

The Secretary of the Evaluation Board claimed that in the tender dossier, para 11 (a) and 11 (b) referred to *‘General Information’* and *‘Financial and Economic Standing’* whilst in Outlook Coop’s ‘Tender Form’ these referred to *‘Tender Guarantee’* and *‘General Information’* respectively. He said that in line with the regulations of the public procurement only (a) and (b) indicated in the ‘Tender Form’ of the ‘Tender Dossier’ could be rectified at the administrative evaluation stage and not those indicated in Outlook Coop’s ‘Tender Form’

Dr Cremona intervened to state that that, in view of the different wording used in the ‘Tender Form’, it was most probable that they took the ‘Tender Form’ from another ‘Tender Dossier’.

When the appellant’s representatives were asked by the Public Contracts Review Board to state why the ‘cross references’ were not the same, the reply given by Mr Hilary Caruana was that this could have been a mistake or through an oversight, but he did not think that a tender should be lost because the headings were numbered instead of alphabetically labelled.

Continuing Mr Borg Camilleri said that the *‘subcontracting table’* and the column under the heading *‘Proportion of Responsibilities’* were both missing in the ‘Tender Form’ submitted by Outlook Coop.

He said that the word *‘false’* in the phrase *‘... We also fully recognise and accept that any false, inaccurate or incomplete information....’* under Section C (10) was also missing.

The ‘Notes’, included at the end of Section C (11), were also missing. These notes stated that:

- “
1. *Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within two working days from notification. This is indicated by the symbol o*
 2. *No rectification shall be allowed. Only clarifications on the submitted information may be requested. This is indicated by the symbol ● “*

The Evaluation Board’s Secretary said that Outlook Coop’s declaration under Section C (6) of the ‘Tender Form’, which is being reproduced hereunder for ease of reference, was given to understand that the appellant had tendered as a Joint Venture.

‘We are making this application in our own right for this tender and [led Outlook Coop] for this tender. We confirm that we are not tendering for the same contract in any other form. [We confirm that all partners are jointly

and severally liable by law for the performance of the contract, that the lead partner is authorised to bind, and receive instructions for and on behalf of, each member, and that all partners in the joint venture are bound to remain in the joint venture for the entire period of the contract's performance]. We are fully aware that, in the case of a consortium, the composition of the consortium cannot be modified in the course of the tender procedure.'

Mr Kenely intervened by pointing out that on page 6 of the 'Tender Form' they clearly indicated '*Power of Attorney (not applicable)*' and '*Data on Joint Venture/Consortium (not applicable)*' and the rationale demonstrated that the bid was being made by a single tenderer. On his part, Mr Caruana added that the alterations made did not change the substance of the tender. He claimed that the fact they did not provide data of the other partner in the Joint Venture it stood to reason that they were tendering on their own.

When asked by the Public Contracts Review Board to state whether the appellant's offer met the scope of tender, Mr Borg Camilleri replied that they only evaluated the administrative compliance of their bid.

He contended that the Evaluation Board could not use its discretion because Clause 10.3 of the 'Tender Dossier' already referred to earlier in these proceedings by Dr Cremona was very specific. Here, he made reference also to the Contracts Circular No 11/2011 re 'Contacting Procedures' that was issued on 16 April 2010 wherein *inter alia* it was stated:

'Such committees do not have any discretion to decide arbitrarily as to which offer is compliant or not.'

Furthermore, he said that Note 2 under Clause 16 .1 (e) specified that '*No rectification shall be allowed. Only clarifications on the submitted information may be requested.*'

When asked to indicate which issues and/or shortcomings were considered fundamental, Mr Borg Caruana mentioned the fact that the 'Subcontracting Table' was missing and that under (a) of Clause 11 of the Tender Form they included 'Tender Guarantee' instead of 'General Information'. The representatives of Outlook Coop replied that they had clearly indicated that 'Sub Contracting' was not applicable and that no bid bond was required.

At this point the Public Contracts Review Board remarked that the fact that no bid bond was requested for this tender confirmed that the 'Tender Form' was taken from another 'Tender Dossier'. The appellant's attention was drawn to the fact that they should have made a cut and paste from the appropriate tender and that they had no right to tamper with documentation. Furthermore, the Public Contracts Review Board placed emphasis on the fact that the appellant should have reproduced the 'Tender Form' included in the 'Tender Dossier'.

In reply to a specific question by the Public Contracts Review Board as to whether the Evaluation Board was in a position to take a decision after taking into consideration the holistic content of the 'Tender Form', the reply given by Mr Joe Borg Camilleri was in the negative. Mr Borg Camilleri reiterated that the Evaluation Board was not in a position to accept offers if such offers were not totally administratively compliant.

Mr Borg Camilleri said that before making a decision they contacted the Departmental Contracts Committee. He said that the Evaluation Board did not have any discretion and the Departmental Contracts Committee informed them that the decision was correct.

Ms Martina Eggert, Chairperson of the Evaluation Board, explained that they had forwarded their recommendations to the Departmental Contracts Committee and agreed with them that, taking into consideration the alterations made by the tenderer, they were not administratively compliant.

The Public Contracts Review Board claimed that the Evaluation Board should have demonstrated more pragmatism and should have taken into account of the substance over the form. Ms Eggert pointed out that they did not have the discretion to decide arbitrarily on which tenders were administratively compliant or not and that they had to seek the approval from the Departmental Contracts Committee. She remarked that they had discarded other tenders because they did not follow these specific rules. At this point her attention was drawn by the Public Contracts Review Board that it was acknowledged that the Evaluation Board did not have the remit to allow alterations to the tender document but it appeared that the content was there but in a different format. The Chairperson of the Evaluation Board sustained that in the tender document it was clearly specified that all documents must be submitted as such and they treated all tenders in accordance with the same rules and conditions. She argued that if some tenderers made the effort to submit exactly what they were requested to provide, it would not have been fair on them to accept others who did not comply with such specific requirements.

Dr Justin Fenech, as representative of Knowledge Innovation Centre, an interested party, intervened by stating that there was a 'form' for a purpose and every tenderer had to submit that same 'form' so that the Board would evaluate that specific 'form'. He insisted that every tenderer had to comply strictly with the regulations.

Dr Cremona concluded by stating that everyone had to abide by the same rules and that the Evaluation Board had no discretion on the matter.

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 April 2011 and also through their verbal submissions presented during the hearing held on 6th July 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) they were provided with three reasons as to why their tender was deemed to be administratively not compliant, namely (1) '*Documentation related to Form 2 missing*', (2) '*No details regarding subcontracting*' and (3) '*Tender Form supplied not in the requested wording*', (b) with regard to (a) (1) the '*Power of Attorney*' was not applicable for their bid because they were not forming a joint venture/ consortium, (a) (2) in the signed 'tender form' they clearly indicated '*Sub-contracting (not applicable)*' and the reason for this was that they were not subcontracting any part of the bid or any part of the Lots, (a) (3) due to the fact that the 'form' was available only in PDF format they had to recreate it in word format and

included the wording accordingly and as applicable and (c) the rationale demonstrated that the bid was being made by a single tenderer;

- having considered the contracting authority's representative's reference to the fact that (a) the appellant company's bid was not deemed to be compliant for the reasons mentioned by Mr Kenely, (b) there were minor and substantial discrepancies between the 'Tender Form' submitted by Outlook Coop and that included in the 'Tender Dossier' citing instances where, in the opinion of the Evaluation Board, such discrepancies arose, claiming in the process that they had listed fifteen anomalies and five missing items in Outlook Coop's 'Tender Form' (c) in the tender dossier, para 11 (a) and 11 (b) referred to 'General Information' and 'Financial and Economic Standing' whilst in Outlook Coop's 'Tender Form' these referred to 'Tender Guarantee' and 'General Information' respectively, (d) in view of the different wording used in the 'Tender Form', it was most probable that they took the 'Tender Form' from another 'Tender Dossier', (e) the alterations made did not change the substance of the tender, (f) the Evaluation Board was not in a position to accept offers if such offers were not totally administratively compliant, (g) the Evaluation Board was not in a position to take a decision after taking into consideration the holistic content of the 'Tender Form', (h) they did not have the discretion to decide arbitrarily on which tenders were administratively compliant or not and that they had to seek the approval from the Departmental Contracts Committee and (i) in the tender document it was clearly specified that all documents must be submitted as such and they treated all tenders in accordance with the same rules and conditions,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that the appellant should have remained faithful to the content as specifically stated in the contracting authority's tender dossier. Undoubtedly, it is generally unacceptable for an entity to modify, in any way, the content of a document issued by another organisation.
2. The Public Contracts Review Board, however, argues that the Evaluation Board should have demonstrated more pragmatism and should have taken into account the overall substance over the form and, in this instance, the Public Contracts Review Board feels that, albeit may be listed or referred to by a different name or phrase, yet, all the information was included by the appellant. This Board concludes that the examples provided by the Evaluation Board to justify the latter's position are considered by this Board as immaterial and of a trivial nature within a holistic context where the substance was conspicuously evident *vis-a-vis* the form.

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

Joseph Croker
Member

15 July 2011