

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case No. 331**

**CT/3082/2010; Adv. No. CT/A/33/2010**

### **Tender for the Provision of Specialist ICT Training and Certification for Selected Employees within the Public Administration – Lot 6.**

This call for tender was published in the Government Gazette of the 1st October 2010 with a closing date of the 11th November 2010.

The estimated value of this tender was of €1,613,983 for all the 12 lots.

Recommended tenderer's offer for Lot 6 is of €774 whilst Appellant's offer for same Lot amounts to €2,450.

Computer Domain Ltd filed an objection against the decision to award Lot 6 of the tender to The Computer Training Centre Ltd (TCTC).

The Public Contracts review Board composed of Mr Edwin Muscat as Acting Chairman, with Messrs Carmel Esposito and Joseph Croker as members, convened a meeting on Wednesday 5<sup>th</sup> October 2011 to hear submissions on this objection.

#### **Present:**

#### **Computer Domain Ltd**

Dr Chris Tabone	Legal Representative
Mr Nick Callus	Representative

#### **The Computer Training Centre Ltd (TCTC)**

Dr George Hyzler	Legal Representative
Mr Ray Abela	Representative

#### **Centre for Development, Research & Training (CDRT) – Office of the Prime Minister**

#### **Evaluation Board**

Dr Philip von Brockdorff	Chairman
Mr George Falzon	Member
Mr Arthur Gerada	Member
Mr Kevin Buhagiar	Member

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

**Dr Chris Tabone, on behalf of Computer Domain Ltd, the appellant,** made the following submissions:

- i. by letter dated 24<sup>th</sup> June 2011, the Contracts Department had informed his client that Lot 6 had been awarded to TCTC since the offer of Computer Domain was not the cheapest compliant offer;
- ii. in the first place, Lot 6 had been awarded to his client but that decision had been overturned following the appeal lodged by the recommended tenderer in February 2011 whereby, TCTC had been reinstated in this tendering process;
- iii. it therefore followed that the offer was awarded to TCTC on the basis of price;
- iv. he conceded that when compared like-with-like, i.e. taking into account only the four mandatory courses, the quote by TCTC was cheaper than that of his client;
- v. the higher price offered by his client when compared to that of the recommended tenderer for the four mandatory courses came about because his client decided to quote an inflated price for the mandatory courses in order to offer an advantageous price for the recommended (non mandatory) courses. Moreover, he claimed that his client offered his employees/tutors a three year contract covering eight courses and that entailed additional expenses;
- vi. the objection arose on the basis of the provisions of Volume 3 Section 1 clause 4.2 (1) (page 61) which, among other things, stipulated as follows:

*The training domains are segregated into 12 lots. Each lot lists a number of mandatory and recommended (non mandatory) courses. Each tenderer bidding for a particular lot should have the necessary resources to deliver training and certification where applicable in ALL the mandatory modules. **The tenderer will be awarded additional points if equipped with the necessary resources to also deliver the recommended courses and relevant certifications in each lot.** Tenderers are also encouraged to propose other recommended courses (preferably with a recognised certification) that are not listed as long as the training falls within the remit of that particular domain.*

- vii. TCTC was correct to offer only the four mandatory courses but his client was equally correct in offering eight courses, four mandatory and four recommended, so much so that his client qualified, or rather, was entitled for the award of extra points;
- viii. the questions that arose were: Was his client awarded extra points for his quotes in respect of the recommended courses, as provided for in the tender document? If in the affirmative, at what stage were these points awarded, how

many were awarded and what influence, if any, had these points on the final decision of the adjudication board?; and

- ix. the adjudication board should have based its decision on the whole package and not solely on the mandatory items.

**Dr Philip von Brockdorff, chairman of the adjudication board**, explained that the adjudication board considered the mandatory courses separately from the recommended courses so as to compare like-with-like, since TCTC did not offer the recommended courses;

**Mr Arthur Gerada, member of the adjudication board**, submitted the following remarks:-

- a. the board first considered the mandatory courses for technical compliance;
- b. once bidder qualified with regard to the mandatory courses, then the board considered the recommended courses. If bidders offered any of the latter courses, they were awarded extra points according to a weighting system; and
- c. in respect of Lot 6, only the appellant, Computer Domain, offered the recommended courses and in this case it was decided not to consider the recommended courses so that all the bids would be adjudicated like-with-like, i.e. on the basis of the mandatory courses only.

The A/Chairman PCRB requested the criteria/weighting used for the award of points to Computer Domain which had offered for both the mandatory and recommended courses for Lot 6 in line with Volume 3 Section 1 clause 4.2 (1) as it appeared that such criteria and relative point allocations were not stipulated in the tender document.

Dr von Brockdorff remarked that the adjudicating board had acted on the decision of the PCRB whereby TCTC was reinstated in the tendering process on being found technically compliant. Hence, the adjudication board awarded points only for the mandatory courses and went for the cheapest offer with regard to Lot 6.

Dr Tabone remarked that the way the adjudication board acted defeated the scope of Volume 3 Section 1 clause 4.2 (1), i.e. to provide an incentive to those bidders who offered for both mandatory and recommended courses.

**Dr George Hyzler, legal representative of TCTC**, put forward the following arguments:-

- i. it was undesirable to have ambiguities in such tender documents, however, prior to cancelling a tendering procedure, one had to endeavour to find acceptable ways how to save the tendering process;
- ii. since both bidders were adjudicated technically compliant, then the deciding factor had to be the price and, in this case, given the significant difference between the offers for Lot 6 i.e. recommended offer €774 and appellant's offer € 2,450, then the other considerations with regard to the

recommended/optional items assumed far less importance because they were ancillary items;

- iii. he disagreed with the price difference justification put forward by the appellant, i.e. that appellant had inflated the price of the mandatory courses to enable him to reduce the price with regard to the recommended courses so as to present them as one package because the tender document treated the mandatory courses and the recommended courses separately so much so that one could offer the mandatory courses without offering the recommended courses. Besides, a separate price had to be quoted in respect of each and every course; and
- iv. it was rather common for a tender document to contain certain contradictions and if one were to be rigid in interpretations then most of the tendering processes would have to be cancelled.

Dr Tabone remarked that it has emerged that the adjudicating board did not allocate any extra points to his client for the recommended courses and that was contrary to what was indicated in Volume 3 Section 1 clause 4.2 (1).

The hearing came to an end at 11.10 am.

#### **This Board,**

- having noted that appellants in terms of their ‘reasoned letter’ of the 30<sup>th</sup> June 2011 and also during their verbal submissions of the 5<sup>th</sup> October 2011 had objected to the decision taking by the Contracting Authority;
- having taken note of the appellant’s representative claims, that, (a) the quote of the recommended bidder was accepted on the basis of price, (b) when compared on a like-with-like basis, that is, taking into account only the four mandatory courses, the price quoted by the recommended bidder was cheaper than that of his client. This was because his client quoted an inflated price for the mandatory courses in order to offer an advantageous price for the recommended courses, and (c) that in spite of the provisions of clause 4.2 Vol 3 section 1 of the tender where it is stated that ‘*the tenderer will be awarded additional points if equipped with the necessary resources to also deliver the recommended courses .....*’ the tender document did not indicate how these additional points were to be allocated, neither does it result that any additional points were actually given, and (d) whereas TCTC had offered only for the four mandatory courses, his client offered for all eight courses, and thus, he was entitled for the award of extra points, and (e) the adjudicating board should have based its decision on the whole package and not only on the mandatory items.
- having taken note of the arguments brought forward by the representatives of the Contracting Authority, namely, CDRT to the effect that (a) the adjudication board considered the mandatory courses separately from those recommended so as to be able to compare like-with-like (b) the board first considered the mandatory courses for technical compliance. Those that qualified and happened to also offer the recommended courses were awarded extra points according to a weighting

system (d) for Lot 6 only, since only one bidder, Computer Domain, offered the recommended courses, the Adjudication Board decided not to consider the recommended courses so that all the bids were adjudicated on the basis of the mandatory basis only.

- having also considered the arguments brought forward by the legal representative of the recommended bidder, TCTC, that (a) while it was undesirable to have ambiguities in tender documents, one should endeavour to find acceptable ways to save the tendering process; (b) while both tenderers were found to be technically compliant than the determining factor had to be the difference in price which in this instance was significant, then other considerations assumed less importance; (c) he disagreed with the appellant's claim that he was at a disadvantage since he quoted for the whole package and the price quoted for the mandatory courses was as a result, loaded, to make the whole package more attractive seeing that each tenderer had to quote separately for each course; (d) it was quite common for tender documents to have certain contradictions which if one were to adopt a rigid stance would render most of the tenders invalid;

reached the following conclusions, namely, that:

(a) the appellant's claim that he was at a disadvantage when pricing the different courses since he submitted quotations for the whole package including those recommended, was not justified once a separate price had to be quoted in respect of each course. Neither was appellant justified to inflate the price of mandatory courses to enable him to reduce the price of recommended ones so as to present them as one package

(b) the appellant's claim that he was not awarded any points for having submitted offers for the whole package of Lot 6 including those recommended in breach of clause 4.2 Volume 3 Section 1 of the Tender Document was confirmed by the evidence given by the representative of the adjudicating board when he said that only the mandatory courses were taken into consideration in Lot 6 and no points were assigned to the bidder who quoted for the whole package. This Board cannot accept a situation where a department or an authority sets the criteria on how a tender is to be awarded and then ignores that criteria.

In consideration of the above, the Board

(a) decides that the tender insofar as Lot 6 is concerned should be cancelled. In re-issuing the tender, the department is enjoined to indicate clearly the criteria to be used in assessing the bids, including the way, points, if any, would be assigned, and

(b) recommends that, in the circumstances, the deposit paid by appellants should be reimbursed.

Edwin Muscat  
Chairman

Carmelo Esposito  
Member

Joseph Croker  
Member

*17 October 2011*