

PUBLIC CONTRACTS REVIEW BOARD

Case No. 333

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 19th November 2010. The closing date for this call with an estimated budget for both lots being € 28,800 was the 10th December 2010.

Seven (7) tenderers submitted their offers.

Rausi Co Ltd filed an objection on the 27th July 2011 against the decision by the Ministry for Resources and Rural Affairs to once again disqualify its tender on being found administratively 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 Wednesday, 17th October 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

Mr Chris Gauci	Representative
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:

Architect Norbert Gatt	Chairman
Mr Saviour Sciberras	Member
Architect Chanelle Busuttill	Member

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

Dr Antonio Tufigno, legal representative of Rausi Ltd, the appellant company, stated that, by letter dated 20th July 2011, the Ministry for Resources and Rural Affairs informed his client that its offer was found administratively not compliant in terms of clause 2.9.4 because "*No separate tender forms for each individual option was submitted and therefore options not clearly identifiable.*"

Dr Tufigno made the following submissions:-

- i. on the 24th May 2011 his client was invited by the contracting authority to attend a meeting to discuss the tender submission which meeting took place on the 30th May 2011 and during which the discussion did not centre on the content of the tender but on an oversight of the contracting authority whereby it failed to inform his client of another administrative shortcoming, this time concerning the 'tender forms';
- ii. expressed his disapproval to the contracting authority's move to set up an informal meeting with the bidder at the end of which he was asked to reconsider whether to proceed with his company's appeal;
- iii. pointed out that his client was being compelled to lodge an appeal for the second time in respect of the same tender and, once again, at the administrative stage;
- iv. referred to clause 5.3.2 which laid down that "*Unsuccessful bidders shall be notified with the outcome of the evaluation process, and shall be provided with the following information: (a) the criteria for the award*";
- v. deplored the fact that the second shortcoming was not included in the first letter of rejection dated 10th May 2011 since, according to clause 5.3.2, as an unsuccessful bidder, his client had the right to be notified with the outcome of the evaluation process in respect of all the criteria of the award, namely not only notified of 'the samples' - the issue raised in the first appeal - but also of the 'tender forms' - the reason brought up in the second disqualification; and
- vi. claimed that this procedural mistake vitiated the process.

Architect Norbert Gatt, Chairman of the evaluation board, made the following remarks:-

- a. the first evaluation report dated 20th April 2011 had clearly indicated both administrative shortcomings with regard to the appellant company's submission, namely the samples and the tender forms;
- b. unfortunately, through a genuine oversight, the Departmental Contracts Committee failed to inform the appellant company of the 'tender form' issue in its letter of rejection issued on the 10th May 2010 and, to remedy the situation, it requested the

informal meeting of the 30th May 2011 to explain this second shortcoming and the possible consequences on the company's proposed appeal;

- c. although he had tried to raise this second 'tender form' shortcoming before the Public Contracts Review Board during the hearing that dealt with the first appeal concerning 'the samples', yet he was ruled out of order since that hearing had to deal only with the reason/s communicated to the appellant company, namely 'the samples' and that no fresh issues were to be brought up since the appellant company would not have had the opportunity to prepare its defense;
- d. notwithstanding the fact that the appellant company had already been subjected to an appeal concerning this issue and no matter how genuine the contracting authority's oversight was, still, the contracting authority could not overlook the issue concerning the tender forms;
- e. clause 2.9.4 provided as follows namely that different "*options are to be clearly identifiable in the technical and financial submission; thus, a separate Tender form marked 'Option 1'; 'Option 2' etc for each individual option clearly outlining the rates of the relative option, is to be submitted. Failure to abide by this clause shall render the Tender null*";
- f. Clause 2.9.4 left no room for any clarification but called for immediate rejection;
- g. it turned out that in the appellant company presented multiple options on each of the three Tender Declarations submitted; and
- h. the contracting authority had requested the advice of the Contracts Department which read as follows

"It is the view of the Department of Contracts that the tenders received are based on the published tender conditions and any tender that breaches these conditions is to be disqualified."

Ms Jackie Borg Cardona, also representing the appellant company, explained the Tenderer's Declararions as follows:

Option 1 featured Tables A, B and C against Chairs A, B and C each with its own price and therefore Option 1 represented in one tender declaration three combinations with three different prices;

and

Option 2 featured one table and six different chairs which, once again, represented six options in one tender declaration and, it was further explained, the third declaration form featuring another five chairs marked 'D' to 'H' were to be matched with the table at Option 2 thus providing a further five options.

Ms Borg Cardon attributed this kind of presentation to the lack of space available on the printed Tenderer's Declaration.

Architect Gatt stated that the tenderer was clearly requested in the tender document to present on each tender form one option comprising one table and one chair with one price and that it was unacceptable for tenderers to offer multiple options in one tender form such that it was left up to the contracting authority to pick any one of the combinations. He added that clause 2.9.4 of the tender document was clear on this point and there was no room for any further clarifications.

Mr John Rausi, also representing the appellant company, argued that the company had offered two options but the choice within those two options was left up to the client. He maintained that one could identify the options and combinations and one could even attach a price to each one of them.

The Chairman Public Contracts Review Board remarked that (a) the contracting authority should have desisted from calling upon the appellant company's representatives to consider withdrawing the company's appeal, since it was entirely up to the tenderer to exercise or not the right to appeal, (b) he could not help noting that the options were presented in a rather confusing fashion and certainly not in line with clause 2.9.4 and (c) the overriding consideration for the Public Contracts Review Board was the content of and the presentation of the appellant company's tender submission.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant's company, in terms of the reasoned letter of objection of the 27th July 2011, and through the verbal submissions made during the hearing held on the 17th October 2011, had objected against the decision by the Ministry for Resources and Rural Affairs to once again disqualify its tender on being found administratively non-compliant;
- having noted the appellant firm's representatives claims and observations regarding the fact that (a) by letter dated 20th July 2011, the Ministry for Resources and Rural Affairs informed the said appellant company that its offer was found administratively not compliant in terms of clause 2.9.4 because "*No separate tender forms for each individual option was submitted and therefore options not clearly identifiable.*", (b) on the 24th May 2011 the company's representative was invited by the contracting authority to attend a meeting to discuss the tender submission which meeting took place on the 30th May 2011 and during which the discussion did not centre on the content of the tender but on an oversight of the contracting authority whereby it failed to inform the appellant company of another administrative shortcoming, this time concerning the 'tender forms', (c) they were disgruntled by the contracting authority's move to set up an informal meeting with the bidder at the end of which the appellant company was asked to reconsider whether to proceed with its appeal, (d) pointed out that the appellant company was being compelled to lodge an appeal for the second time in respect of the same tender and, once again, at the administrative stage, (e) clause 5.3.2 specifically laid down that "*Unsuccessful bidders shall be notified with the*

outcome of the evaluation process, and shall be provided with the following information:

(a) the criteria for the award”, (f) one could not but deplore the fact that the second shortcoming was not included in the first letter of rejection dated 10th May 2011 since, according to clause 5.3.2, as an unsuccessful bidder, the appellant company had the right to be notified with the outcome of the evaluation process in respect of all the criteria of the award, namely not only notified of ‘the samples’ - the issue raised in the first appeal - but also of the ‘tender forms’ – the reason brought up in the second disqualification, (g) the appellant company’s reference to various options in the original submission as the only way one could have presented content due to the lack of space available on the printed ‘Tenderer’s Declaration’ and (h) the company had offered two options but the choice within those two options was left up to the client maintaining in the process that one could not only identify the options and combinations but could even attach a price to each one of them;

- having considered the contracting authority’s representative’s submissions, namely that (a) the first evaluation report dated 20th April 2011 had clearly indicated both administrative shortcomings with regard to the appellant company’s submission, namely the samples and the tender forms, (b) unfortunately, through a genuine oversight, the Departmental Contracts Committee had failed to inform the appellant company of the ‘tender form’ issue in its letter of rejection issued on the 10th May 2010 and, to remedy the situation, it requested the informal meeting of the 30th May 2011 to explain this second shortcoming and the possible consequences on the company’s proposed appeal, (c) although an attempt was made for the issue relating to the ‘tender form’ shortcoming before the Public Contracts Review Board during the first hearing that dealt with the first appeal concerning ‘the samples’, yet, on this occasion, this issue was ruled out of order since that hearing had to deal only with the reason/s communicated to the appellant company, namely ‘the samples’ and that no fresh issues were to be brought up since the appellant company would not have had the opportunity to prepare its defence, (d) notwithstanding the fact that the appellant company had already been subjected to an appeal concerning this issue and, no matter how genuine the contracting authority’s oversight was, still, the contracting authority could not overlook the issue concerning the ‘tender forms’, (e) clause 2.9.4 provided that different *“options are to be clearly identifiable in the technical and financial submission; thus, a separate Tender form marked ‘Option 1’; ‘Option 2’ etc for each individual option clearly outlining the rates of the relative option, is to be submitted. Failure to abide by this clause shall render the Tender null”* - leaving no room for any clarification but called for immediate rejection, (f) it turned out that in the appellant company presented multiple options on each of the three ‘Tender Declarations’ submitted, (g) the contracting authority had requested the advice of the Contracts Department with the latter replying that *“It is the view of the Department of Contracts that the tenders received are based on the published tender conditions and any tender that breaches these conditions is to be disqualified.”* and (h) the tenderer was clearly requested in the tender document to present on each ‘tender form’ one option comprising one table and one chair with one price and that it was unacceptable for tenderers to offer multiple options in one tender form such that it was left up to the contracting authority to pick any one of the combinations;

reached the following conclusions:

1. The Public Contracts Review Board feels that the contracting authority should have desisted from calling upon the appellant company's representatives to consider withdrawing the company's appeal since it was entirely up to the tenderer to exercise or not the right to appeal
2. The Public Contracts Review Board opines that the options as presented by the appellant company were presented in a rather confusing manner and, undoubtedly, not in line with clause 2.9.4 which necessitated that different *"options are to be clearly identifiable in the technical and financial submission; thus, a separate Tender form marked 'Option 1'; 'Option 2' etc for each individual option clearly outlining the rates of the relative option, is to be submitted. Failure to abide by this clause shall render the Tender null"* - leaving no room for any clarification.

In view of the above this Board finds against the appellant company and recommends that the deposit paid by the latter should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Joseph Croker
Member

31 October 2011