

PUBLIC CONTRACTS REVIEW BOARD

Case No. 336

TM/057/2010

Request for Proposals for the Provision of Architectural Services and Project Management Services for the Renovation and Extension of the Land Transport Directorate Office in Hornworks Ditch, Floriana

This call for tenders was published in the Government Gazette on 8th October 2010. The closing date for this call with an estimated budget for both lots being € 45,000 was the 29th October 2010.

Ten (10) tenderers submitted their offers.

C & C Projects filed an objection on the 15th July 2011 against the decision by Transport Malta to disqualify its tender on being found administratively non-compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Friday, 21st October 2011 to discuss this objection.

Present for the hearing were:

C & C Projects

Architect Paul Cuschieri	Representative
Ing. Carmel Cuschieri	Representative

Dr Pierre Farrugia

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Transport Malta (TM)

Dr Joseph Camilleri	Legal Representative
Mr Maurizio Micallef	Representative

Evaluation Board:

Mr Vincent Micallef Pule	Member
Mr Edric Micallef	Member
Mr Kevin Brincat	Member

Preliminary Hearing

Following the exchange of correspondence regarding the admissibility or otherwise of the appeal lodged by C & C Projects that seemed to lead to nowhere, the Public Contracts Review Board decided to hold a preliminary hearing with the parties concerned during which the following emerged:-

- i. according to the published schedule of tenders received the appellant company learned that it had offered the cheapest priced offer;
- ii. Transport Malta sent a letter of refusal dated 10th June 2011 by regular mail which, besides being erroneously addressed to Mr Zammit, reached the appellant company on the 18th June 2011 and whereby the company was advised that if it decided to lodge an appeal it had to follow the procedure outlined in Part XIII of Legal Notice 296 of 2010 - Public Procurement Regulations (PPR) - which stated that the appeal had to be presented within 10 days;
- iii. however, on filing the appeal the appellant company was informed by Mr Maurizio Micallef of Transport Malta that, in this case, Reg. 21 of the Public Procurement Regulations – as indicated in the tender document - was applicable and not Part XIII of the Public Procurement Regulations – as indicated in the letter of the 10th June 2011 – and, as a result, the appeal should have been presented within 5 days, which period had already lapsed by the time the appellant company received the notification;
- iv. Reg. 21 of the Public Procurement Regulations laid down that the contracting authority was obliged to inform the tenderer or candidate concerned of the publication of award by fax or electronic mail something which Transport Malta failed to do with regard to the appellant company – Transport Malta, through Dr Joseph Camilleri, argued that Reg. 21, which dealt with tenders worth less than €120,000, obliged the contracting authority to inform by fax or electronic mail the successful tenderer only and not all participating tenderers, something which was considered inconsistent when compared to the provisions under Part XIII of the Public Procurement Regulations ;
- v. Transport Malta has since taken the appropriate administrative measures so that certain mistakes would not repeat themselves in the tendering process; and
- vi. this case was the subject of a court case, during which Transport Malta had agreed, in the particular circumstances of this case, to accept the appeal presented by C & C Projects and, in turn, the Court, without going into the merits of the case, considered the proceedings as having been exhausted in view of the agreement reached by the two parties concerned

In the light of the above, the Public Contracts Review Board decided to accept the letter of objection and to proceed with the public hearing.

Hearing

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

Architect Paul Cuschieri, representing C & C Projects, stated that by letter dated 10th June 2011 Transport Malta had informed his firm that its offer was found to be administratively non-compliant without giving any reason to support that decision.

Mr Maurizio Micallef, representing Transport Malta, under oath, confirmed that although the appellant company was not given the reason for refusal in the letter dated 10th June 2011, at a later stage, when the appellant company's representative called at his office he had informed him that his company's offer was rejected because no price was quoted in the 'Tender Form'. He added that measures had since been taken to correct such deficiencies in the tendering process.

Architect Cuschieri made the following submissions:-

- i. whilst conceding that section 3 in the 'Tenderer's Declaration' of the 'Tender Form' was left blank through an oversight on their part, yet other information had been given and the 'Tender Form' was duly signed;
- ii. the Public Procurement Regulations did provide the opportunity for the rectification and/or clarification of such shortcomings and even clause 29 of the tender document contained similar provision, that is:

'29.1 When checking and comparing tenders, the evaluation committee may, after obtaining approval from the Procurement Committee, ask a tenderer to clarify any aspect of his tender

29.2 Such requests and the responses to them must be made by email or fax. They may in no circumstances alter or try to change the price or content of the tender, except to correct arithmetical errors discovered by the evaluation committee when analysing tenders in accordance with Clause 31.'

- iii. Transport Malta was, therefore, expected to request a correction by way of filling in the price in the 'Tender Form', in which case C & C Projects would have inserted the same price/amount already given in the 'Financial Bid' and that would not have amounted to any alteration but it would have amounted to a confirmation;
- iv. C & C Projects had, in fact, provided a breakdown of the price it was offering in Volume 4 'Financial Bid' which breakdown added up to €12,000, the same figure that had been displayed on the *Schedule of Tenders Received*; and
- v. the information given in the original tender submission left no doubt as to the price offered by C & C Projects.

On his part, Dr Camilleri, legal representative of Transport Malta, remarked that:-

- a. the tenderer would be binding himself / his company with what it had been stated in the 'Tender Form' and, as a result, the 'Tender Form' had to be entirely and correctly filled in;
- b. one of the items that had to be checked, according to the administrative compliance grid, was whether the 'Tender Form' was complete which, in the case of the appellant company, the answer had to be 'Not completed' and that was precisely what led to the disqualification of the appellant company's offer on administrative grounds;
- c. a clarification could be requested on given information and not on information that had not been submitted;
- d. Note 3 at page 16 of the 'Tender Form' indicated, with regard to clause 11 (f) 'Tender Form, and Financial Offer/Bill of Quantities', that "*No rectification shall be allowed. Only clarifications on the submitted information may be requested*" and, in this case, the price on the 'Tender Form' had not been submitted.

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 dated 28th June 2011 and filed on the 15th July 2011, and through the verbal submissions made during the hearing held on the 21st October 2011, had objected against the decision by Transport Malta to 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 10th June 2011 Transport Malta had informed the appellant company that its offer was found to be administratively non-compliant without giving any reason to support that decision, (b) whilst conceding that section 3 in the 'Tenderer's Declaration' of the 'Tender Form' was left blank through an oversight on their part, yet other information had been given and the 'Tender Form' was duly signed, (c) in view of the fact that the Public Procurement Regulations did provide the opportunity for the rectification and/or clarification of such shortcomings Transport Malta was expected to request a correction by way of filling in the price in the 'Tender Form', in which case C & C Projects would have inserted the same price/amount already given in the 'Financial Bid' and that would not have amounted to any alteration but it would have amounted to a confirmation and (d) C & C Projects had, in fact, provided a breakdown of the price it was offering in Volume 4 'Financial Bid' which breakdown added up to €12,000, the same figure that had been displayed in the *Schedule of Tenders Received* and the information given in the original tender submission left no doubt as to the price offered by C & C Projects;
- having considered the contracting authority's representative's submissions, namely that (a) although the appellant company was not given the reason for refusal in the letter dated 10th

June 2011, at a later stage, when the appellant company's representative called at the office of Transport Malta's official, the latter informed the appellant company's representative that his company's offer was rejected because no price was quoted in the 'Tender Form', (b) the tenderer would be binding himself / his company with what it had been stated in the 'Tender Form' and, as a result, the 'Tender Form' had to be entirely and correctly filled in, (c) one of the items that had to be checked, according to the administrative compliance grid, was whether the 'Tender Form' was complete which, in the case of the appellant company, the answer had to be 'Not completed' and that was precisely what led to the disqualification of the appellant company's offer on administrative grounds, (d) a clarification could be requested on given information and not on information that had not been submitted, (e) Note 3 at page 16 of the 'Tender Form' indicated, with regard to clause 11 (f) 'Tender Form, and Financial Offer/Bill of Quantities', that no "*rectification shall be allowed*" ... "*only clarifications on the submitted information may be requested*" and, in this case, the price on the 'Tender Form' had not been submitted,

reached the following conclusions:

1. The Public Contracts Review Board agrees with the contracting authority's argument relating to the fact that a tenderer would bind itself with what it states in the 'Tender Form' and, as a result, a 'Tender Form' has to be entirely and correctly filled in.
2. The Public Contracts Review Board opines that a clarification can only be requested on given information and not on information that would not have been submitted.
3. This Board also feels that Note 3 at page 16 of the 'Tender Form' indicated, with regard to clause 11 (f) 'Tender Form, and Financial Offer/Bill of Quantities', that no "*rectification shall be allowed. Only clarifications on the submitted information may be requested*" and, in this case, the price on the 'Tender Form' had not been submitted.
4. The Public Contracts Review Board notes that section 3 in the 'Tenderer's Declaration' of the 'Tender Form' was left blank and, regardless of the fact that as to whether this happened through an oversight on the appellant company's part or not, one cannot overlook the fact that this was a mandatory requirement . Undoubtedly, this Board argues that, as unfortunate as it may be, the non submission of a mandatory requirement, albeit genuine, still substantially contravenes the compliance requirements of the tender.

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

Carmel Esposito
Member

Joseph Croker
Member

31 October 2011