

PUBLIC CONTRACTS REVIEW BOARD

Case No. 342

CT/2206/2010; DH/103/2010

Tender for the Supply of Powdered Soups

This call for tenders was published in the Government Gazette on 23rd November 2010. The closing date for this call with an estimated budget of € 152,881 (excl. VAT) was the 18th January 2011.

Two (2) tenderers submitted their offers.

General Distributors Ltd filed an objection on the 30th June 2011 against the decision by the Contracts Department to disqualify its tender and to recommend award to P.J. Sutters (Marketing) Ltd.

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 Wednesday, 2nd November 2011 to discuss this objection.

Present for the hearing were:

General Distributors Ltd

Mr Peter Paul Bonnici	Managing Director
Ms Odette Longo	Representative

P.J. Sutters (Marketing) Ltd

Ms Therese Cassar	Representative
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Health Division – Ministry of Health, the Elderly and Community Care (MHEC)

Evaluation Board:

Mr John Bottiglieri	Chairperson
Ms Frances Muscat	Member
Mr Mario Camilleri	Member
Ms Marita Sacco	Secretary

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

Mr Peter Paul Bonnici, representing General Distributors Ltd, the appellant company, gave the following explanations:-

- i. the Contracts Department had informed him by email dated 28th June 2011 that (a) his company's tender had been rejected because the registration of premises requested at clause 9 of the tender document (page 44) had not been submitted and (b) the tender was recommended for award to P.J. Sutters (Marketing) Ltd;
- ii. according to the schedule of tenders received his firm's offer of €118,043.20 was much cheaper than that of the recommended tenderer at €180,204.48;
- iii. he conceded that the reason for rejection given by the contracting authority was correct in the sense that his company had failed to provide what was requested at clause 9 of the technical specification and in Form 4.6 (1.1), which read as follows, namely "*Tenderers are to provide the location where the powdered soups are to be manufactured and/or stored. Tenderer is also to provide proof of registration of premises, according to (L.N. 180 of 2001 as amended by L.N. 136 of 2007)*";
- iv. his company's interpretation of the term 'manufactured and/or stored' was that the 'and/or' provided a kind of an option to indicate either the manufacturer's location or the location of storage and not the location of both the manufacturing and storage facilities;
- v. the appellant company provided only the location of the overseas manufacturer;
- vi. the location of the company's storage facilities, which was duly covered by the *Food Safety Commission* certification, was provided at the appeal stage; and
- vii. the contracting authority could have sought a clarification on this matter, especially given the wide variation in the price quoted by the competing bidder.

Mr Bottiglieri, chairman of the adjudication board, remarked that the tender document was quite clear on this mandatory requirement so much so that clause 9 was printed in capital letters and included the term 'TENDERERS ARE TO PROVIDE'. He pointed out that the appellant company's Food Safety Commission certificate was dated 20th June 2011 whereas the closing date of the tender was the 18th January 2011.

The Chairman, Public Contracts Review Board, remarked that in this case it appeared that the product was going to be manufactured overseas and, therefore, it was reasonable for the contracting authority to ascertain that the facilities where the product was going to be stored were up to standard so as to preserve the product's quality. He added that the omission of mandatory documentation was not subject of clarification by the contracting authority.

Ms Therese Cassar, representing P.J. Sutters (Marketing) Ltd, the recommended tenderer, stated

that it was emerging quite clearly at the hearing that the appellant company's bid was non-compliant and, as a result, should be excluded from the tendering process whereas the bid submitted by P.J. Sutters (Marketing) Ltd was compliant in all respects. Ms Cassar's contention that her firm was not informed by the Contracts Department that the recommended award was subject to appeal in terms of the Public Procurement Regulations was incorrect as demonstrated in Contacts Department email dated 28th July 2011 sent to the recommended tenderer.

Ms Odette Longo, also representing the appellant company, recommended that, in future, it might be clearer if in the tender document one were to substitute the wording 'and/or' with 'as well as'.

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 30th June 2011 and through the verbal submissions made during the hearing held on the 2nd November 2011, had objected against the decision by the Contracts Department to disqualify its tender and to recommend award to P.J. Sutters (Marketing) Ltd;
- having noted the appellant firm's representatives claims and observations regarding the fact that (a) his company's tender had been rejected because the registration of premises requested at clause 9 of the tender document (page 44) had not been submitted and (b) the tender was recommended for award to P.J. Sutters (Marketing) Ltd, (c) according to the schedule of tenders received his firm's offer of €118,043.20 was much cheaper than that of the recommended tenderer at €180,204.48, (d) he conceded that the reason for rejection given by the contracting authority was correct in the sense that his company had failed to provide what was requested at clause 9 of the technical specification, (e) his company's interpretation of the term 'manufactured and/or stored' was that the 'and/or' provided a kind of an option to indicate either the manufacturer's location or the location of storage and not the location of both the manufacturing and storage facilities, (f) his company provided only the location of the overseas manufacturer, (g) the location of the company's storage facilities, which was duly covered by the *Food Safety Commission* certification, was provided at the appeal stage and (h) the contracting authority could have sought a clarification on this matter, especially given the wide variation in the price quoted by the competing bidder;
- having considered the contracting authority's representative's submissions, namely that (a) the tender document was quite clear on this mandatory requirement so much so that clause 9 was printed in capital letters and included the term 'TENDERERS ARE TO PROVIDE' and (b) the appellant company's Food Safety Commission certificate was dated 20th June 2011 whereas the closing date of the tender was the 18th January 2011;
- having also given due consideration to the recommended tenderer's representative's submissions, namely that it was quite clearly at the hearing that the appellant company's bid was non-compliant and, as a result, should be excluded from the tendering process whereas the bid submitted by P.J. Sutters (Marketing) Ltd was compliant in all respects,

reached the following conclusions:

1. The Public Contracts Review Board feels that, in this case, it appeared that the product was going to be manufactured overseas and, therefore, it was reasonable for the contracting authority to ascertain that the facilities where the product was going to be stored were up to standard so as to preserve the product's quality.
2. The Public Contracts Review Board opines that the omission of mandatory documentation is not subject of a clarification by the contracting authority.
3. The Public Contracts Review Board concurs with the evaluation board's reference to the fact that the tender document was quite clear on the mandatory requirement so much so that clause 9 was printed in capital letters and included the term 'TENDERERS ARE TO PROVIDE'.

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

Carmel Esposito
Member

14th November 2011