

PUBLIC CONTRACTS REVIEW BOARD

Case No. 357

MRRA/W/251/2011

Tender for Auditing Services for the Approving Body (Eco-Contribution)

This call for tenders was published in the Government Gazette on 10th May 2011. The closing date for offers was 31st May 2011.

The estimated value of this tender was € 120,000.

Six (6) tenderers submitted their offers.

PKF Malta Ltd filed an objection letter dated 17th August 2011 against the decision taken by the Ministry for Resources and Rural Affairs to disqualify its tender submission as technically not compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr Carmel Esposito and Mr Joseph Croker as members convened a meeting on Thursday 15th December 2011 to discuss this objection.

Present for the hearing were:

PKF (Malta) Ltd

Dr Chris Borg	Legal Adviser
Mr George Mangion	Representative
Mr Reuben Zammit	Representative

PricewaterhouseCoopers Ltd

Ms Anna Camilleri	Representative
Mr George Sammut	Representative

Ministry for Resources and Rural Affairs

Adjudicating Board

Mr Ian Azzopardi	Member
Ms Mary Farrugia	Member
Mr Victor Debrincat	Secretary

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

Dr Chris Borg, legal representative of PKF (Malta) Ltd, the appellant company, made the following submissions:

- i. by letter dated 11th August 2011 the Ministry for Resources and Rural Affairs had informed his client that his company's offer was not found technically compliant in terms of mandatory clause 1.2.9 since it only included seven (7) full-time employees in the accounting /auditing profession against the minimum of twenty (20) requested;
 - ii. clause 1.2.9 stated that:

“Tenderers are requested to submit with their offer a profile of the Auditing Firm / Auditing Body that would be carrying out the required technical assignment. The profile shall include the name and qualifications of a minimum of twenty full-time professional employees. Failure to submit this information shall disqualify the bid.”
 - iii. that clause provided for twenty professional full-time employees and not for twenty professional accountants/auditors and, as a consequence, his client's submission did satisfy the tender requirement;
 - iv. his client had, in fact, provided in his tender submission 23 full-time professional employees and, as a result, he failed to understand how the contracting authority arrived at the conclusion that his client only submitted 7 full-time professional employees;
- and
- v. once the technical requirements were satisfied then the award criterion was the price in which respect his client was the cheapest

Mr Ian Azzopardi, a member of the adjudicating board, submitted the following explanations:-

- a. he sat on the adjudicating board representing the Approving Body within the Ministry of Finance and, as such, he was not involved in the drawing up of the estimated value of the tender which, as rightly pointed out by the Chairman Public Contracts Review Board, at €120,000 was considerably high compared to the offers received;
- b. clause 1.2.9 had to be seen also in the light of clause 1.1.2 which stated that:

“In view of the nature of the technical assignment required by this tender, the Contracting Authority will only consider tenders submitted by auditing bodies that have a minimum of twenty full-time employees qualified in the auditing and/or accounting profession”;

- c. on examining the list of 23 employees submitted by the appellant company one would note the following:-

<u>Employee no</u>	<u>Qualification</u>
3	MBA eBusiness
6, 8 to 10	Bachelor of Commerce
11 and 15	ACCA partly qualified
12 and 16	diploma in managerial studies and accounts respectively
13	diploma course in accounting and finance
14	degree in management
17 and 18	lawyers

- d. he was also aware that employees no. 19 and 20 were accountants and partners in another audit firm and, as a consequence, they could not be termed as employees of the bidding company;
- e. if one were to take the above into consideration it would clearly emerge that the appellant company did not meet the requirements set out in clauses 1.1.2 and 1.2.9;
- f. the recommended tenderer provided a list of personnel that, by far, satisfied the tender requirements; and
- g. the purpose behind this tender requirement was to ascertain that the contractor had the capacity to carry out the contract.

Mr George Mangion, representing the appellant company, made the following remarks:-

- i. today's accounting and auditing work required, apart from accountants and auditors, personnel qualified in other areas such as e-business and so forth;
- ii. in 1992, the accountancy profession act was amended to include multi-disciplined professionals, so much so that employee no. 3, who possessed an MBA eBusiness, was approved by the Malta Financial Services Authority as full-time partner in PKF Ltd;
- iii. regarding employee nos. 19 and 20, PKF Ltd had entered into an agreement with the pertinent audit firm to make use of their services under 'sub-contracting' as provided for in the tender document (clause 1.2.7 and form at page 23);
- iv. it was conceded that a Bachelor of Commerce, similar to a holder of an ACCA qualification, did not hold a warrant of an accountant or auditor but, on the other hand, s/he was a qualified employee;
- v. a distinction had to be drawn between being 'qualified' and being 'warranted' and he claimed to have sought a 'verbal' clarification on that;

- vi. certain duties did not have to be carried out by qualified accountants/auditors but by supporting staff;
- vii. it would not be feasible for the recommended tenderer to deploy 20 warranted accountants/auditors on this assignment considering that it quoted the price of €22,900 and, as a consequence, he questioned the validity of this tender requirement if applied to the letter;
- viii. in submitting the bid his firm provided a lot of information, such as, how the working groups were going to be composed with each group headed by a fully qualified accountant/auditor, and having indicated no less than 25 elements as to how the assignment was going to be attended to together with the rates applicable; and
- ix. the appellant firm was more than competent to undertake this contract.

Dr Borg pointed out that clause 1.1.2 referred to 20 full-time employees qualified in the auditing and/or accounting profession whereas clause 1.2.9 referred to 20 full-time professional employees.

Mr George Sammut, representing the recommended tenderer, remarked that a lump sum was quoted because that was what the tender document requested in the 'Schedule of Prices and Rates' (page 25) but to arrive at that global amount they had worked out the cost of the various stages of the process involved. He added that the technical capacity of the tenderer also had a bearing on the price since the employment of qualified accountants and auditors was costlier than the employment of persons in lower grades.

The Chairman Public Contracts Review Board made the following comments:-

- i. notwithstanding the amendments mentioned by the appellant company, still, a lawyer or a Bachelor of Commerce could not carry out the duties of an accountant or an auditor;
- ii. if the tender document required a clarification to the term 'qualified' used in clause 1.1.2 and the term 'professional employees' used in clause 1.2.9 then the tenderers had all the opportunity to do that during the drawing up of the tender submission and prior to the closing date of the tender;
- iii. it could well be the case that the assignment contemplated in the tender did require 20 qualified accountants/auditors, apart from the supporting staff;
- iv. the tender document was rather inconsistent in (1) having clause 1.2.2 requesting tenderers to complete the form ('Schedule of Rates') giving the rates in Euros for each item as indicated and, at the same time, (2) having the 'Schedule of Prices & Rates at' page 25 of the tender document requesting the bidders to quote only the total cost including all taxes and charges, namely a lump sum;

- v. although the tender document could have been drawn up in a more comprehensive way, it had to be acknowledged that the recommended tenderer did submit what was requested as per tender conditions and specifications; and
- vi. it was true that the appellant company had gone the extra mile in providing such information as individual rates, yet, certain details were to be furnished upon engagement rather than at tendering stage.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant company, in terms of the reasoned letter of objection dated 17th August 2011 and through the verbal submissions made during the hearing held on the 15th December 2011, had objected against the decision taken by the Ministry for Resources and Rural Affairs to disqualify its tender submission as technically not compliant;
- having noted the appellant firm's representatives' claims and observations regarding the fact that (a) company's offer was not found technically compliant in terms of mandatory clause 1.2.9 since it only included seven (7) full-time employees in the accounting /auditing profession against the minimum of twenty (20) requested, (b) clause 1.2.9 provided for twenty professional full-time employees and not for twenty professional accountants/auditors and, as a consequence, the appellant company's submission did satisfy the tender requirement, (c) the appellant company provided in its tender submission 23 full-time professional employees and, as a result, the company's representatives failed to understand how the contracting authority arrived at the conclusion that it only submitted 7 full-time professional employees, (d) once the technical requirements were satisfied then the award criterion was the price in which respect the appellant company was the cheapest, (e) today's accounting and auditing work required, apart from accountants and auditors, personnel qualified in other areas such as e-business and so forth, (f) in 1992, the accountancy profession act was amended to include multi-disciplined professionals, so much so that employee no. 3, who possessed an MBA eBusiness, was approved by the Malta Financial Services Authority as full-time partner in PKF Ltd, (g) regarding employee nos. 19 and 20, PKF Ltd had entered into an agreement with the pertinent audit firm to make use of their services under 'sub-contracting' as provided for in the tender document (clause 1.2.7 and form at page 23), (h) it was conceded that a Bachelor of Commerce, similar to a holder of an ACCA qualification, did not hold a warrant of an accountant or auditor but, on the other hand, the person in question was a qualified employee, (i) a distinction had to be drawn between being 'qualified' and being 'warranted' with the appellant company's representative claiming to have sought a 'verbal' clarification on that from the contracting authority, (j) certain duties did not have to be carried out by qualified accountants/auditors but by supporting staff, (k) it would not be feasible for the recommended tenderer to deploy 20 warranted accountants/auditors on this assignment considering that it quoted the price of €22,900 and, as a consequence, one would question the validity of this tender requirement if applied to the letter and (l) in submitting the bid the

appellant company provided a lot of information, such as, how the working groups were going to be composed with each group headed by a fully qualified accountant/auditor, and having indicated no less than 25 elements as to how the assignment was going to be attended to together with the rates applicable;

- having considered the contracting authority's representative's submissions, namely that (a) clause 1.2.9 had to be seen also in the light of clause 1.1.2 which stated that "*In view of the nature of the technical assignment required by this tender, the Contracting Authority will only consider tenders submitted by auditing bodies that have a minimum of twenty full-time employees qualified in the auditing and/or accounting profession*", (b) on examining the list of 23 employees submitted by the appellant company one would note that no. 19 and 20 were accountants and partners in another audit firm and, as a consequence, they could not be termed as employees of the bidding company, (c) the recommended tenderer provided a list of personnel that, by far, satisfied the tender requirements and (d) the purpose behind this tender requirement was to ascertain that the contractor had the capacity to carry out the contract;
- having also considered the recommended tenderer's representative's submissions namely that (a) a lump sum was quoted because that was what the tender document requested in the 'Schedule of Prices and Rates' (page 25) but to arrive at that global amount they had worked out the cost of the various stages of the process involved and (b) the technical capacity of the tenderer also had a bearing on the price since the employment of qualified accountants and auditors was costlier than the employment of persons in lower grades,

reached the following conclusions:

1. The Public Contracts Review Board opines that notwithstanding the amendments mentioned by the appellant company, still, a lawyer or a Bachelor of Commerce could not carry out the duties of an accountant or an auditor.
2. The Public Contracts Review Board feels that the tender document was rather inconsistent in (a) having clause 1.2.2 requesting tenderers to complete the form ('Schedule of Rates') giving the rates in Euros for each item as indicated and, at the same time, (b) having the 'Schedule of Prices & Rates at' page 25 of the tender document requesting the bidders to quote only the total cost including all taxes and charges, namely a lump sum.
3. The Public Contracts Review Board argues that if the tender document required a clarification to the term 'qualified' used in clause 1.1.2 and the term 'professional employees' used in clause 1.2.9 then the tenderers had all the opportunity to seek such clarification during the drawing up of the tender submission and prior to the closing date of the tender.
4. The Public Contracts Review Board acknowledges that, although the tender document could have been drawn up in a more comprehensive way, it had to be stated that the recommended tenderer did submit what was requested as per tender conditions and specifications.

5. The Public Contracts Review Board contends that whilst it was true that the appellant company had gone the extra mile in providing such information as individual rates, yet, certain details were to be furnished upon engagement rather than at tendering stage.

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 J Esposito
Member

Joseph Croker
Member

26th December 2011