

PUBLIC CONTRACTS REVIEW BOARD

Case No. 387

CT/2066/2011 - Adv No CT/115/2011

Tender for the Provision of Insurance Services to the Employment and Training Corporation

This call for tenders was published in the Government Gazette on the 26th April 2011. The closing date for this call with an estimated budget of € 150,000 was the 23rd June 2011.

Three (3) tenderers submitted their offers.

Messrs Allcare Insurance Brokers filed an objection on the 28th November 2011 against the decisions of the Employment and Training Corporation to disqualify its offers as non-compliant and to recommend the award of the tender to Mediterranean Insurance Brokers (Malta) Ltd.

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 Wednesday, 14th March 2012 to discuss this objection.

Present for the hearing were:

Allcare Insurance Brokers

Dr Simon Schembri	Legal Representative
Dr Simon Pullicino	Legal Representative
Ms Judith Galea	Representative
Mr Ramon Mizzi	Representative

Mediterranean Insurance Brokers (Malta) Ltd (MIB)

Dr Henri Mizzi	Legal Representative
Dr Steve Decesare	Legal Representative
Mr Joseph Cutajar	Representative
Ms Fiona Borg	Representative
Ms Brenda Buhagiar	Representative

Employment and Training Corporation (ETC)

Dr Ian Spiteri Bailey	Legal Representative
Mr Edwin Camilleri	Representative

Evaluation Board

Mr John Trapani	Chairman
Mr Jonathan Ferrito	Member
Mr Jean Pierre Meilaq	Member
Ms Josephine Farrugia	Member
Mr Martin Casha	Secretary



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

Dr Simon Schemri, legal representative of Allcare Insurance Brokers, the appellant company, made the following submissions:-

- i. by letter dated 18th November 2011, the contracting authority had informed his client that his company's offers were found to be non-compliant because these failed to satisfy a number of conditions/specifications as listed in Annex 1;
- ii. the various annotations made by the adjudicating board that 'no reference was made to this requisite' against the various insurance policies offered by his client were incorrect because those references were included in his client's tender submission;
- iii. most of the insurance policies requested in the tender concerned 'all risks policies' or similar policies and that kind of insurance policy covered everything except specific exclusions that had to be indicated;
- iv. it therefore followed that since most of the insurance covers requested were of the 'all risks' type then the contracting authority's indications that 'no reference was made to this requisite' were incorrect because those requisites were covered since they were not specifically excluded;
- v. his client made no reference to the services rendered by the Civil Protection Department because the relative expenses were met out of the Consolidated Fund as provided for in Chapter 411 – the Civil Protection Act;
- vi. regarding the 'Group Personal Accident Insurance', his client had included a capping of €120,000, which limit was subject to an annual revision as was the practice in the case of such insurance policies;
- vii. according to clause 16 of the 'Instructions to Tenderers' a 'tender form' had to be submitted for each option and whereas his client submitted 3 options and 3 corresponding 'tender forms', the recommended tenderer only submitted 1 option and 1 'tender form';

and
- viii. his client's three options satisfied the tender requisites and were between €10,000 to €12,000 cheaper than the recommended offer

On his part Dr Ian Spiteri Bailey, legal representative of the contracting authority, submitted that:-

- a. the content of the letter of objection submitted by Allcare Insurance Brokers was in itself proof that the appellant company's offers were non-compliant and that the appeal was inadmissible;
- b. the appellant company made repeated references to a 'standard policy' but it failed to furnish the contracting authority with the relevant document;



- c. the tender submission made by the appellant company included a number of assumptions which were unacceptable;

and

- d. bidders were obliged to provide the requested documentation in full and they were not expected to assume that certain aspects were covered by standard policies and, as a consequence, refrain from giving that information or even provide information which was not requested in the tender document.

Mr Martin Casha, secretary to the adjudicating board, explained that:-

- i. the tender document included all the specifications with regard to each insurance policy requested, including the 'extensions', and the contracting authority expected the bidders to meet those specifications;
- ii. wherever the bidder made reference to a 'standard policy', the bidder was required to submit the document relative to that standard policy so that it would form an integral part of its tender submission and, consequently, part of the contract but the appellant company failed to provide that information;
- iii. the evaluation exercise consisted mainly in comparing the bidders' tender submissions with the tender specifications but, in the case of appellant company, the adjudicating board was unable to do that since certain information had not been made available;
- iv. during the evaluation various discrepancies were noted in the appellant company's tender submission, among them the following:-
 - a. page 45 of the appellant company's tender submission concerning the 'Industrial Risks Policy' and, specifically, the 'goods in transit', wherein the appellant company stated ... *"in transit by any vehicle owned and operated by the insured employee anywhere within the geographical area to and from the insured premises* whereas the tender document requested: *transits within the premises including yards, parks and open spaces within the confines of the premises of the insured"*. So, the appellant company restricted the term 'in transit' solely to the use of vehicles and eliminated the manual transfer/handling of goods and, moreover, the same company restricted cover to 'to and from the premises' whereas the tender document specified 'within the confines of the premises';
 - b. the tender document mentioned 'including cover for strikes, riots and civil commotion' whereas the appellant company mentioned at page 38 of its submission 'riots, malicious damage (which was not requested)' but did not mention 'strikes and civil commotion';
 - c. the tender document included under extensions ... *"cover for storm, tempest, flood, tsunami, sea waves, hurricane, cyclone and typhoon or any other convulsions of nature"* whereas the appellant company

indicated ... “*storm, tempest, flood, tsunami (this is considered within the definition of earthquake)*”. Nevertheless, the appellant company did not give the definition of ‘earthquake’ and hence the contracting authority could not verify what the term ‘earthquake’ included, namely if it did include ‘tsunami’;

- d. page 34 of the appellant company’s submission included the following wording with regard to cover for earthquakes, hurricanes and typhoon, namely “*subject to the insured having the agreed extra premium, this insurance shall be extended to include the risk of theft*”. The adjudicating board’s interpretation of that wording was that if the Employment and Training Corporation were to insist on the cover of the risks requested in the tender document then that would involve an extra premium, the quantum of which was unknown to the contracting authority, when the tender document was quite clear in its requirements and provided for no extra premium;
- e. and
- f. whilst, under ‘Group Personal Accident Insurance’, the contracting authority requested benefits in case of death and permanent total and partial disablement equivalent to 4 x the basic salary of the insured employee, yet, in this instance, the appellant company introduced a capping of €120,000 which implied a maximum salary of €30,000 when the tender document imposed no such capping because, besides having one employee who had a salary in excess of €30,000, it was envisaged that, during the 3 year contract period, the number of employees whose basic salary would exceed €30,000 would increase.

Dr Schembri remarked that:-

- i. the last clause of page 38 of his client’s submission was quite clear that it covered everything that was not excluded;
 - ii. in the letter of objection he indicated the page number in his client’s tender submission where one could find the information that the contracting authority was claiming not to have been submitted by the appellant company;
 - iii. the ‘agreed extra premium’ was already included in the price offered by his client for that particular policy, in other words reflecting the fact that the total price offered by his client was fixed;
 - iv. if a policy included a clause to the effect that ‘any other cause not excluded’ then it was clear that it included them and that was a standard clause found in ‘all risks policies’;
- and
- v. the contracting authority could have asked for a clarification if it felt that certain terms, which were widely used in the insurance business, might have not been clear enough.

Dr Spiteri Bailey remarked that in his letter of objection under 'Miscellaneous' the appellant company stated that

"Some clauses have been expressly omitted from the Complainant's tender document because they are usually applied to other types of policies."

He added that a tenderer was not meant to make such assumptions and went on to quote clause 21.1 of the tender document which states that

"No variant solutions will be accepted. Tenderers must submit a tender in accordance with the requirements of the tender document."

Dr Henri Mizzi, legal representative of the recommended tenderer, submitted the following:-

- a. the appellant company was correct in stating that, in the case of 'all risks policies', all risks were considered covered except for the items specifically excluded on purpose;
- b. out of the five policies mentioned under section 2 'Inclusions by Default' of the letter of objection only two, namely the 'Industrial All Risks Insurance Policy' and the 'Electronic Equipment Insurance Policy' were 'all risks' policies and hence one did not have to list all the risks that were being covered;
- c. in the case of the other insurance policies, not being 'all risks policies', one had to specify all the risks that were being covered;
- d. Mediterranean Insurance Brokers (Malta) Ltd had submitted five options but only one option was displayed on the Employment and Training Corporation's website and the said option had nothing to do with the appellant company's objection;

and

- e. with regard to the cases referred to under 'Miscellaneous' in the letter of objection, the bidder had to offer what the contracting authority requested with no deviations and a clear infringement committed by the appellant company concerned the 'Group Personal Accident Insurance Policy' where the said company introduced a capping of €120,000 whereas the contracting authority requested no such capping, which meant that one employee who had a basic salary of €40,000 and other employees, who during the 3-year contract period would have a basic salary in excess of €30,000, would not be covered to the extent requested by the Employment and Training Corporation. This infringement alone was enough to render the appellant company's bid non-compliant.

Mr Joseph Cutajar, also representing the recommended tenderer, offered the following technical explanations:-

- i. contrary to what the appellant company stated, there were no 'standard policies' as such;



- ii. contrary to what the appellant company seemed to imply, 'Fidelity' and 'Public Liability' insurance policies were not designed on the principle that everything was included in the cover except for the exclusions;
 - iii. regarding Civil Protection Department claims, it was not correct to say that those were necessarily made good for out of the public purse and reference was made to a case pending before the Courts which involved a claim 95% of which represented civil protection charges;
- and
- iv. the definition of 'employees' was very important with regard to 'public liability' because only the categories of employees specified in the policy would be covered to the exclusion of the rest.

Ms Judith Galea, also representing Allcare Insurance Brokers Ltd, remarked that:-

- a. albeit Mr Cutajar was correct with regard to the 'all risks policies', yet one had to appreciate that, with regard to the 'Public Liability' and the 'Acquired Liability', Allcare Insurance Brokers was covering any legal liability that might arise involving third parties, except for the exclusions, and, as a result, there was no need to identify all the risks covered;
 - b. with regard to the issue of whether full-time and part-time employees were covered, Allcare Insurance Brokers was offering cover to all employees on the books of the Employment and Training Corporation whether full-time or part-time;
 - c. the appellant company clearly indicated in the letter of objection the page numbers of the company's tender submission where one could find the reference to the tender requisites which the adjudicating board apparently failed to note;
 - d. although the term 'tsunami' was not expressly indicated, the appellant company included the term 'earthquake' which was the cause of a tsunami and hence 'tsunami' was indirectly included;
- and
- e. the contracting authority could have sought a clarification with regard to the interpretation of certain terms, especially when there was a €12,000 difference in the price.

Dr Spiteri Bailey remarked that whilst the appellant company included any employee, yet the tender document included 'trainees and/or students' (page 53 'Extensions' (9)).

Mr Cutajar stated that it was not correct for one to assume that a tsunami was caused only by an earthquake because there were instances that a tsunami was caused by a massive landslide ending up in the sea and hence it was necessary for the term 'tsunami' to be included in the insurance cover.

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

- i. the adjudicating board had to evaluate on the documents submitted by the bidders;
 - ii. the adjudicating board could not request information which should have been submitted in the first place;
 - iii. the financial offer had to be definite and not subject to changes arising from conditions imposed by the bidder;
- and
- iv. one would expect that a sweeping clause in an insurance policy would refer to minor aspects and not to the main aspects of the policy which one would have already specified.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 9th February 2012 and also through their verbal submissions presented during the hearing held on the 14th March 2012, had objected against the decisions of the Employment and Training Corporation to disqualify its offers as non-compliant and to recommend the award of the tender to Mediterranean Insurance Brokers (Malta) Ltd;
- having noted all of the appellant company's representatives' claims and observations, particularly, the references made to the fact that (a) by letter dated 18th November 2011, the contracting authority had informed the company that its offers were found to be non-compliant because these failed to satisfy a number of conditions/specifications as listed in Annex 1, (b) the various annotations made by the adjudicating board that 'no reference was made to this requisite' against the various insurance policies offered by the appellant company were incorrect because those references were included in the latter's tender submission, (c) most of the insurance policies requested in the tender concerned 'all risks policies' or similar policies and that kind of insurance policy covered everything except specific exclusions that had to be indicated, (d) since most of the insurance covers requested were of the 'all risks' type then the contracting authority's indications that 'no reference was made to this requisite' were incorrect because those requisites were covered since they were not specifically excluded, (e) the appellant company made no reference to the services rendered by the Civil Protection Department because the relative expenses were met out of the Consolidated Fund as provided for in Chapter 411 – the Civil Protection Act, (f) regarding the 'Group Personal Accident Insurance' the company had included a capping of €120,000, which limit was subject to an annual revision as was the practice in the case of such insurance policies, (g) according to clause 16 of the 'Instructions to Tenderers' a 'tender form' had to be submitted for each option and whereas the appellant company submitted 3 options and 3 corresponding 'tender forms', the recommended tenderer only submitted 1 option and 1 'tender form', (h) the company's three options satisfied the



tender requisites and were between €10,000 to €12,000 cheaper than the recommended offer, (i) the last clause of page 38 of the appellant company's submission was quite clear that it covered everything that was not excluded, (j) in the letter of objection the appellant company's lawyer indicated the page number in the latter's tender submission where one could find the information that the contracting authority was claiming not to have been submitted by the appellant company, (k) the 'agreed extra premium' was already included in the price offered by the appellant company for that particular policy, in other words reflecting the fact that the total price offered by his client was fixed, (l) if a policy included a clause to the effect that 'any other cause not excluded' then it was clear that it included them and that was a standard clause found in 'all risks policies', (m) the contracting authority could have asked for a clarification if it felt that certain terms, which were widely used in the insurance business, might have not been clear enough, (n) albeit the recommended tenderer's representative was correct with regard to the 'all risks policies', yet one had to appreciate that, with regard to the 'Public Liability' and the 'Acquired Liability', Allcare Insurance Brokers was covering any legal liability that might arise involving third parties, except for the exclusions, and, as a result, there was no need to identify all the risks covered, (o) with regard to the issue of whether full-time and part-time employees were covered, Allcare Insurance Brokers was offering cover to all employees on the books of the Employment and Training Corporation whether full-time or part-time and (p) although the term 'tsunami' was not expressly indicated, the appellant company included the term 'earthquake' which was the cause of a tsunami and hence 'tsunami' was indirectly included;

- having considered the contracting authority's representative's reference to the fact that (a) the content of the letter of objection submitted by Allcare Insurance Brokers was in itself proof that the appellant company's offers were non-compliant and that the appeal was inadmissible, (b) the appellant company made repeated references to a 'standard policy' but it failed to furnish the contracting authority with the relevant document, (c) the tender submission made by the appellant company included a number of assumptions which were unacceptable, (d) bidders were obliged to provide the requested documentation in full and they were not expected to assume that certain aspects were covered by standard policies and, as a consequence, refrain from giving that information or even provide information which was not requested in the tender document, (e) the tender document included all the specifications with regard to each insurance policy requested, including the 'extensions', and the contracting authority expected the bidders to meet those specifications, (f) wherever the bidder made reference to a 'standard policy', the bidder was required to submit the document relative to that standard policy so that it would form an integral part of its tender submission and, consequently, part of the contract but the appellant company failed to provide that information, (g) the evaluation exercise consisted mainly in comparing the bidders' tender submissions with the tender specifications but, in the case of appellant company, the adjudicating board was unable to do that since certain information had not been made available, (h) during the evaluation various discrepancies were noted in the appellant company's tender submission (e.g. in respect of (1) the 'goods in transit', (2) 'cover for strikes, riots and civil commotion', (3) 'cover for storm, tempest, flood, tsunami, sea waves, hurricane, cyclone and typhoon or any other convulsions of nature', (4) 'Group Personal Accident Insurance' and (i) a tenderer was not meant to make assumptions, (j) whilst the appellant company included any employee, yet the tender document included 'trainees and/or students' (page 53 'Extensions' (9));



- having also considered the recommended tenderer's representative's reference to the fact that (a) the appellant company was correct in stating that, in the case of 'all risks policies', all risks were considered covered except for the items specifically excluded on purpose, (b) out of the five policies mentioned under section 2 'Inclusions by Default' of the letter of objection only two, namely the 'Industrial All Risks Insurance Policy' and the 'Electronic Equipment Insurance Policy' were 'all risks' policies and hence one did not have to list all the risks that were being covered, (c) in the case of the other insurance policies, not being 'all risks policies', one had to specify all the risks that were being covered, (d) Mediterranean Insurance Brokers (Malta) Ltd had submitted five options but only one option was displayed on the Employment and Training Corporation's website and the said option had nothing to do with the appellant company's objection, (e) with regard to the cases referred to under 'Miscellaneous' in the letter of objection, the bidder had to offer what the contracting authority requested with no deviations and a clear infringement committed by the appellant company concerned the 'Group Personal Accident Insurance Policy' where the said company introduced a capping of €120,000 whereas the contracting authority requested no such capping, which meant that one employee who had a basic salary of €40,000 and other employees, who during the 3-year contract period would have a basic salary in excess of €30,000, would not be covered to the extent requested by the Employment and Training Corporation, (f) contrary to what the appellant company stated, there were no 'standard policies' as such, (g) contrary to what the appellant company seemed to imply, 'Fidelity' and 'Public Liability' insurance policies were not designed on the principle that everything was included in the cover except for the exclusions, (h) regarding Civil Protection Department claims, it was not correct to say that those were necessarily made good for out of the public purse and reference was made to a case pending before the Courts which involved a claim 95% of which represented civil protection charges, (i) the definition of 'employees' was very important with regard to 'public liability' because only the categories of employees specified in the policy would be covered to the exclusion of the rest and (j) it was not correct for one to assume that a tsunami was caused only by an earthquake because there were instances that a tsunami was caused by a massive landslide ending up in the sea and hence it was necessary for the term 'tsunami' to be included in the insurance cover,


reached the following conclusions, namely:

1. The Public Contracts Review Board opines that tenderers were expected to prove that extensions requested by the tender document were in fact provided and included in the policy wording of the documents submitted. The contracting authority is, unquestionably, after peace of mind and one cannot expect this to materialise when a tenderer's submission is expected to be assumed as covering any legal liability that might arise involving third parties, except for the exclusions. This Board concurs with the argument raised by the contracting authority with the latter focusing on the fact that the tender document included all the specifications with regard to each insurance policy requested, including the 'extensions', and that, as a result, it expected the bidders to meet those specifications.
2. This board fails to agree with the appellant company's stand which suggests that since most of the insurance covers requested were of the 'all risks' type then the contracting authority's indications that 'no reference was made to this requisite'

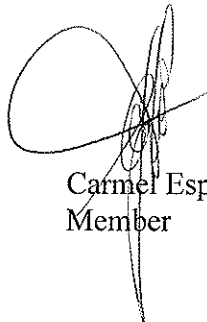
were incorrect because those requisites were covered since they were not specifically excluded. The Public Contracts Review Board fails to understand why the appellant company constantly refers to a 'standard policy' but then in its submission it failed to furnish the contracting authority with the relevant document. This Board feels that it is correct for one to expect that wherever a bidder makes reference to a 'standard policy' such bidder should submit a document relative to that 'standard policy' so that it would form an integral part of one's tender submission.

3. The Public Contracts Review Board acknowledges that, when a bidder fails to submit mandatory information, such bidder will be, perhaps, unknowingly, depriving a bid from being properly evaluated within a proper benchmarking / comparative scenario. Furthermore, when a bidder tends to make unilateral assumptions expecting one and sundry to decide without adequate supporting documentation being submitted it is, undoubtedly, too much of a risk to be shouldered by any tenderer. This Board highlights the fact that tenderers are not expected to assume but to provide all supporting documentation to facilitate a rapid evaluation process based on the highest possible levels of transparency and fair and objective analysis of facts submitted by all participating tenderers.
4. The Public Contracts Review Board argues that bidders had to offer what the contracting authority requested with no deviations and, as a consequence, it cannot agree with the capping of €120,000 introduced by the appellant company in so far as 'Group Personal Accident Insurance Policy' is concerned. It is more than clear that the contracting authority requested no such capping.
5. This Board feels that tenderers should desist from including general clauses such as the last clause of page 38 of the appellant company's submission, which may mean so much to a few but too little or nothing at all to the rest. Needless to say that the Public Contracts Review Board expects that all clauses provide all stakeholders with the right peace of mind that all that should be covered is actually covered and not leave anything to chance and conditioned by subjective interpretations which may differ in substance.

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

21 March 2012