

PUBLIC CONTRACTS REVIEW BOARD

Case No. 436

MTA 822/2012 - Tender for the Provision of a National Audit to assess Accessibility of Tourist Establishments and Relevant Public Areas within Established Tourism Zones in Malta and Gozo

This call was published on the 10th April 2012 with a closing date on the 3rd May 2012. The estimated value amounted to €37,500. Appellant's offer was €22,125. The tender was recommended for cancellation following Departmental Contracts Committee's instructions.

An objection was filed by EMDP Ltd against the decision of the Malta Tourism Authority to cancel the tendering procedure.

The Public Contracts Review Board composed of Mr Joseph Croker as A/Chairman and Mr Carmel Esposito and Mr Paul Mifsud as Members convened a public hearing on Monday, 23rd July 2012 to discuss this objection.

Present for the hearing:

EMDP Ltd

Dr Michael Sciriha	Legal Representative
Ms Vanessa Pisani	Representative

Malta Tourism Authority (MTA)

Dr Frank Testa	Legal Representative
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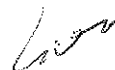
Evaluation Board

Mr Francis Albani	Chairman
Mr Andre Vella	Member
Ms Marie Louise Mangion	Member
Mr Patrick Attard	Secretary

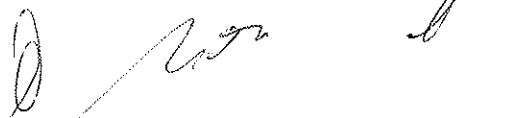
After the A/Chairman's brief introduction, the appellant was invited to explain the motives of his objection.

Dr Michael Sciriha, obo EMDP Ltd, the appellant, made the following submissions:

- i. by email dated 2nd July 2012 MTA had informed his client that the tender procedure was recommended for cancellation because of an inconsistency in the published tender document, i.e. clause 6.1.2 called for 'evidence of relevant experience in carrying out services of a similar nature over the past 5 years' whereas Form 2 of Volume 1 Section 4 'Experience as Contractor' called for a 'List of contracts of a similar nature and extent performed over the past 3 years';



- ii. usually a tender could be cancelled in case of fraud or irregularities or in case the offers would be in excess of the budgetary allocation;
- iii. legally the specific law prevailed over the general law;
- iv. clause 33.3 of the tender document concerning the circumstances where the tender could be cancelled read as follows:
 - a. the tender procedure has been unsuccessful, namely where no qualitatively or financially worthwhile tender has been received or there has been no response at all;
 - b. the economic or technical parameters of the project have been fundamentally altered;
 - c. exceptional circumstances or force majeure render normal performance of the project impossible;
 - d. all technically compliant tenders exceed the financial resources available;
 - e. there have been irregularities in the procedure, in particular where these have prevented fair competition.
- v. the contracting authority indicated that paragraphs (a) to (d) of sub-clause 33.3 did not apply such that it based its decision to cancel the tender on the provisions of paragraph (e);
- vi. the circumstance contemplated in sub-clause 33.3 (e), i.e. irregularities in the procedure leading to unfair competition, was much more serious than the reason brought forward by the contracting authority, i.e. the inconsistency between the provisions of clause 6.1.2 requesting 5 years experience versus Form 2 in Volume 1 Section 4 requesting past performance over the past 3 years;
- vii. clause 1.5 (2) 'Timetable' indicated that the deadline for request of additional information from MTA was 17th April 2012, last date for the issue of additional information by MTA was 27th April 2012 and deadline for submission of tender was 3 May 2012 and therefore there was the opportunity for bidders to request clarifications;
- viii. in the circumstances, the bidders who had only 3 years experience were expected or had all the opportunity to seek a clarification regarding the inconsistency between Form 2 (3 years) and clause 6.1.2 (5 years) however the bidders who had 5 years experience did not have to seek any clarification in this regard because they were compliant in both cases;
- ix. it was not unheard of that a clause and a form in the same tender document did not match, however, in such a case the clauses of the tender document prevailed over the forms contained in the same tender document and therefore clause 6.1.2, which requested 5 years experience, prevailed over Form 2 'Experience as Contractor', which requested works performed over the past 3 years, and this interpretation was upheld by the PCRB on previous occasions;



- x. should the PCRB uphold the decision taken by MTA then in the event of a reissue of this tender his client would be put at a disadvantage *vis-a-vis* his competitors in the sense that his quote had been made public; and
- xi. according to the tender document the reason brought forward by MTA, i.e. inconsistency between the relevant clause and form was not one of the circumstances under which the tender could be cancelled all the more when this inconsistency did not give rise to unfair competition.

Dr Frank Testa, obo MTA, the contracting authority, submitted that:-

- a. the contracting authority did not share the appellant's narrow interpretation of paragraph (e) of sub-clause 33.3 in the sense that it referred almost exclusively to actions carried out in *mala fide* whereas that was not necessarily the case because there could be unintentional inconsistencies in the tender document which would disturb the required level playing field among bidders;
- b. in its evaluation report the adjudicating board had in fact recommended the award of the tender and it was only on the instructions of the Departmental Contracts Committee (DCC) that the contracting authority resorted to the cancellation of the tender;
- c. email dated 21st June 2012 from DCC (at OPM) to the chairman of the adjudicating board stated, among other things, as follows:-
 - 1. The DCC noted that clauses 2 and 3 of Volume 1 Section 2 - Tender Form - require a number of details which are not in line with the services being requested in the call for tenders i.e. reference to Lots.
 - 2. Furthermore, the DCC Secretariat also noticed that there is inconsistency between Clause 6.1.2 of the Tender Document which requires '*evidence of relevant experience in carrying out services of a similar nature over the past 5 years ..*' and Form 2 of Volume 1 Section 4 - Experience as Contractor - which requires a '*list of contracts of a similar nature and extent performed during the past 3 years.*'
 - 3. Therefore, under these circumstances and especially in view that this tender is co-financed, the DCC expects your recommendation to cancel the tender in terms of Clause 33.3 (e) of the tender document, that is, '*there have been irregularities in the procedure, in particular where these have prevented fair competition*'. (Reference this clause is to be made in your recommendation).
 - 4. You may therefore inform the bidders of this decision. Kindly inform that the decision is however subject to an official objection by any aggrieved interested economic operator by 5 working days. A notice of this decision should be published on your notice board.
- d. this decision communicated by the DCC did not leave any alternative to the MTA evaluation board but to cancel the tender; and
- e. in his opinion the issue at hand was a matter of interpretation.

Dr Sciriha lamented that that did not necessarily mean that the DCC had made the right decision in this regard and in fact the bone of contention was precisely the decision to cancel the tender. Dr Sciriha argued that the actions of the contracting



authority seemed to have been directed towards safeguarding the interests of bidders who were only compliant with the 3 years experience required in Form 2 – bidders who also refrained from exercising their right to ask for a clarification in respect of the 5 years experience required at clause 6.1.2 - and he therefore raised the question as to who, in the circumstances, was going to safeguard the interests of the bidders who were fully compliant with the tender conditions and specifications, i.e. satisfying both the 3 year and the 5 year experience requirements.

The PCRB noted that the evaluation board had disqualified the appellant on certain grounds however in the email conveying the tender cancellation decision the MTA failed to inform the appellant that his offer had been disqualified at administrative compliance stage. The A/Chairman PCRB remarked that had the appellant been informed that his offer had been rejected at administrative compliance stage along with the reason behind that rejection he could have opted not to lodge this appeal at all.

Mr Francis Albani, chairman of the evaluation board, replied that once the tender was going to be cancelled there was no point in informing the participating tenderers as to who would have been rejected and who would have been successful. He added that successful and unsuccessful tenderers were so informed at tender award stage however this tendering procedure did not reach that stage as it was cancelled/aborted.

Dr Sciriha remarked that at this stage one had to deal with the cancellation of the tender, which was the only reason communicated to his client that far and then, if need be, one would deal with the alleged administrative non-compliance of his client's offer at a later stage should the decision to cancel the tender be reversed and on his client being eventually formally informed of his disqualification.

This Board,


Having noted that the appellant company objected to the tender being cancelled;

Having noted the appellant firm's representative's claim that by email dated 2nd July 2012 MTA had informed his client that the tender procedure was recommended for cancellation because of an inconsistency in the published tender document, i.e. clause 6.1.2 called for 'evidence of relevant experience in carrying out services of a similar nature over the past 5 years' whereas Form 2 of Volume 1 Section 4 'Experience as Contractor' called for a 'List of contracts of a similar nature and extent performed over the past 3 years';

Having noted that MTA based its decision to cancel the tender on the provision of Clause 33.3 of the tender document which dealt with the circumstances when the Contracting Authority may cancel a call for tender;

Having noted that MTA based its decision specifically on sub-clause 33.3 (e) of the tender which stated that "there have been irregularities in the procedure, in particular where these have prevented fair competition."

Having considered the appellant's observation that the discrepancy between certain provisions in the tender document did not amount to irregularity in the sense given by sub-clause 33.3(e) and that tenderers and the contracting authority had ample opportunity to rectify the mistake through the circulation of a clarification;



Having taken note of the Contracting Authority's representative's counter argument that sub-clause 33.3 (e) may be given a wider interpretation which would encompass unintentional mistakes in the tender document;

Having also noted that the evaluation board had actually recommended the award of the tender which recommendation was however overruled by the department's DCC,

Having noted the Adjudication Board Chairman's contention that he did not see the need to inform tenderers that their bid had already failed at adjudication stage once the tender was to be cancelled,

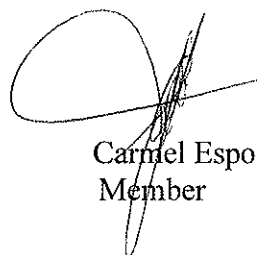
Came to the following conclusions:

1. The fact that the tender document contained a discrepancy in that while clause 6.1.2 required 5 years proven experience the form drawn up to support this clause ie. Form 2 of Volume 1 Section 4 asked for 3 years experience is not in dispute;
2. This discrepancy did not necessarily invalidate a tender and could have easily been rectified had the MTA and/or tenderers asked for a clarification; moreover, tenderers with 5 plus experience satisfied both parameters and conformed to the conditions stipulated in the tender document;
3. The Board did not share the Adjudication Board Chairman's views that there was no need to inform tenderers of all the discrepancies identified in their bid once the tender was to be cancelled. Listing this information would have given the tenderers the opportunity to be in a better position to assess the success or otherwise of any possible appeal and might avoid unnecessary waste of time for all.


In view of the above this Board decides in favour of the appellant, recommends that the tendering process be revived and that the deposit paid by the appellant be refunded in full.



Joseph Croker
A/Chairman



Carmel Esposito
Member



Paul Mifsud
Member

30th July 2012