

PUBLIC CONTRACTS REVIEW BOARD

Case No. 479

MITC/500/2011

Tender for the Provision of Maritime Transport Services for Goods Between the Islands of Malta and (A) any one port lying between the ports of Genoa and Reggio Calabria, and (B) any port in Sicily

This call for tenders was published in the Government Gazette on the 13th January 2012. The closing date for this call with an estimated budget of € 349,000 per annum for 5 years was the 2nd March 2012.

Two (2) tenderers submitted their offers.

Virtu' Ferries Ltd filed an objection on the 5th April 2012 against the decision of the Ministry for Infrastructure, Transport and Communications (MITC) to disqualify its offer as non-compliant and the intention to open up a negotiated procedure with the two bidders that submitted an offer.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Friday, 26th October 2012 to discuss this objection.

Present for the hearing were:

Virtu Ferries Ltd

Dr Ron Galea Cavallazzi	Legal Representative
Dr Steve Decesare	Legal Representative
Mr John Portelli	Representative

Ministry for Infrastructure, Transport and Communications

Dr Susan Sciberras	Legal Representative
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Evaluation Board

Mr Michael Mizzi	Chairman
Mr David Bugeja	Member
Mr Charlo Cassar	Member
Mr Joe Degabriele	Member
Ms Henriette Calleja	Secretary



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

Dr Ron Galea Cavallazzi, legal advisor of Virtu' Ferries Ltd, the appellant company, stated that by letter dated 27th March 2012 the Ministry for Infrastructure, Transport and Communications informed his client that the company's offer did not meet the tender requirements for the following reasons:-

- *the omission of a route between the Islands of Malta and any one Port lying between the Ports of Genoa and Reggio Calabria;*

and

- *the omission of providing a detailed financial offer as required in Articles 1.5 and 3 of the tender document.*

Dr Galea Cavallazzi added that the letter further indicated that the contracting authority intended to open up a negotiated procedure with the two bidders that submitted an offer in the event that no objections were lodged.

A) The omission of a route between the Islands of Malta and any one Port lying between the Ports of Genoa and Reggio Calabria

Dr Galea Cavallazzi, submitted that:-

- i. the tender title itself referred to only one and not to two ports, between two given ports and the clarification issued regarding the change to the tender's title made that point even more clear;
 - ii. there were various instances where the tender document itself referred to only one port such as clause 1.2 which, among other things, stated that "*bidders may opt to service the above by means of a single route operating at least twice weekly; and clause 3.1: The route that the bidder shall service as requested in 1.2 above*";
 - iii. the tender document did not oblige the bidder to include in the company's offer more than one port and neither did it restrict it from offering more than one port and, as a result, a bidder could make an offer for one route;
 - iv. his client's interpretation that the tenderer could make a separate bid for each route would lead to more competition which was a basic concept in public procurement;
- and*
- v. the tender document did not prevent the Ministry for Infrastructure, Transport and Communications from awarding the appellant company the route it had tendered for and, if the Ministry for Infrastructure, Transport and



Communications required another route, then it could issue another tender for that route.

Dr Susan Sciberras, legal representative of the Ministry for Infrastructure, Transport and Communications, submitted that:-

- a. the tender conditions did not allow the bidder to opt for which port, out of the two requested, to submit its offer;
- b. the original title of the tender read '*Tender for the Provision of Maritime Transport Services for Goods Between the Islands of Malta and (A) any one port lying between the ports of Genoa and Reggio Calabria, and (B) the port of Palermo or Catania*';
- c. by letter of clarification dated 16th February 2012 (*not 2011, since tender was issued on 13th January 2012 plus email dated 16th February 2012 whereby amendment was displayed on website*), the title of the tender was altered to read as follows, namely '*Tender for the Provision of Maritime Transport Services for Goods Between the Islands of Malta and (A) any one port lying between the ports of Genoa and Reggio Calabria, and (B) any port in Sicily.*'
- d. contrary to what the appellant company was claiming, both the original and the revised title of the tender clearly referred to two ports, namely the bidder could choose (a) one/any port between Genoa and Reggio Calabria and (b) any port in Sicily (previously either the port of Palermo or Catania);
- e. in this case one should stress the importance of the 'comma' after 'Calabria' and before 'and' which clearly and categorically meant that the tender was referring to two ports and, consequently, the bidder had to include two ports in the company's offer;
- f. the clarification of the 16th February 2012 went on to state that, throughout the tender document, any reference to the 'port of Palermo or Catania' should be replaced by 'any port in Sicily';
- g. clause 1.2 made it quite clear that "*The route required for the purposes of the bid shall be the following ("Route"): between the port of Valletta, Malta and (A) Any One Port lying between the Ports of Genoa and Reggio Calabria, Italy; and (b) any port in Sicily (originally, the Port of Palermo or Catania, Sicily)*" – the 'semicolon' after 'Italy' separated (A) from (B) but then they were linked by 'and';
- h. had the contracting authority used 'or' instead of 'and' between (A) and (B) then the bidder would have had the option of one or the other but, in this instance, it was definitely not the case;
- i. the contracting authority was clear in its requirements that the route had to include two ports – effectively, the bidder had to choose a route or routes but the route/s had to include calling at two ports not at only one port as was the case with the appellant company's offer;



and

- j. the concluding sentence of clause 1.2 ended by '*are serviced at least twice weekly*' which indicated two ports and not one port;

Dr Galea Cavallazzi remarked that another interpretation was that the intention of the contracting authority was to provide a link between Malta and Italy and that that could be achieved by calling either at a port in Sicily or at a port on the mainland itself.

B) The omission of providing a detailed financial offer as required in Articles 1.5 and 3 of the tender document.

Dr Galea Cavallazzi declared that the tender document did not oblige the bidder to provide a breakdown of the company's offer.

Dr Sciberras submitted that:-

- i. sub-clause 1.5, which was one of the general requirements found under the heading 'Scope of Tender', referred to the provision of compensation which was then further explained in section 3 'Financial Offer', namely "Bidders are requested to provide" ... "*a quotation for the amount of compensation calculated by the bidders as necessary to cover the losses suffered by the bidder to fulfil the obligations provided in the Contract, reference being made to 1.5*"
 - ii. a quotation represented a breakdown or a calculation and, in this case, a calculation of how the bidder arrived at the amount of compensation which the contracting authority would pay the bidder to run this service by way of public service obligation;
 - iii. clause 1.1 'Rationale', among other things, stated that "*... will offer compensation for such services assessed on the basis of losses that the successful bidder would incur if the routes and schedule in this tender dossier are serviced on a competitive basis...*";
- and
- iv. it was evident that the contracting authority did not request only a global amount but it also requested the workings as to how that amount was arrived at.

Dr Galea Cavallazzi reiterated that clause 3.1 mentioned a 'quotation for the amount of compensation' and 'the financial offer must be presented as an amount in Euro' and no specific mention was made for the submission of workings. He added that the price offered was the result of a competitive tendering procedure and, ultimately, the contracting authority could have asked for a clarification in this regard.



The Chairman Public Contracts Review Board remarked that once this tender concerned the payment of 'compensation' by way of public service obligation then the contracting authority was entitled to have the bidder's workings justifying the amount of subsidy payable because there were various elements that had to be taken into account in the payment of such government subsidies.

Dr Galea Cavallazzi declared that the circumstances of this case did not justify the action which the contracting authority was contemplating, namely to go for a negotiated procedure because in that case there had to be 'irregular' and 'unacceptable' tenders. At this point the appellant company's legal advisor referred to regulations and EU Directives which explained that:

- 'irregular' tenders were tenders which did not comply with the rules of procurement or tenders the prices of which were manifestly not the result of competitive bidding or tenders which contain one-sided clauses;
- and
- 'unacceptable' referred to such cases as tenders submitted after the expiry of the deadline or tenderers which did not have the necessary qualifications or bids which were abnormally low

Dr Galea Cavallazzi concluded that in the case under review there were none of the above-mentioned circumstances.

Dr Sciberras remarked that Regulation 59 of the Public Procurement Regulations allowed the contracting authority to resort to a negotiated procedure in the case of an irregular tender and the case under review was considered as an irregular tender. She added that the tender called for a route covering two ports and, therefore, the contracting authority could not entertain the bid made by the appellant company which covered only the route Malta-Sicily calling at one port in Sicily.

At this point the hearing came to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated the 5th April 2012 and also through their verbal submissions presented during the hearing held on the 26th October 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 27th March 2012 the Ministry for Infrastructure, Transport and Communications informed the appellant company that the company's offer did not meet the tender requirements for the following reasons (1) the omission of a route between the Islands of Malta and any one Port lying between the Ports of Genoa and Reggio Calabria, (2) the omission of providing a detailed financial offer as required in Articles 1.5 and 3 of the tender document, (b) the letter further indicated that the contracting authority intended to open up a negotiated procedure with the two bidders that



submitted an offer in the event that no objections were lodged, (c) the tender title itself referred to only one and not to two ports, between two given ports and the clarification issued regarding the change to the tender's title made that point even more clear, (d) there were various instances where the tender document itself referred to only one port such as clause 1.2 which, among other things, stated that "bidders may opt to service the above by means of a single route operating at least twice weekly; and clause 3.1: *The route that the bidder shall service as requested in 1.2 above*", (e) the tender document did not oblige the bidder to include in the company's offer more than one port and neither did it restrict it from offering more than one port and, as a result, a bidder could make an offer for one route, (f) the appellant company's interpretation that the tenderer could make a separate bid for each route would lead to more competition which was a basic concept in public procurement, (g) the tender document did not prevent the Ministry for Infrastructure, Transport and Communications from awarding the appellant company the route it had tendered for and, if the Ministry for Infrastructure, Transport and Communications required another route, then it could issue another tender for that route, (h) the intention of the contracting authority was to provide a link between Malta and Italy and that that could be achieved by calling either at a port in Sicily or at a port on the mainland itself, (i) the tender document did not oblige the bidder to provide a breakdown of the company's offer, (j) clause 3.1 mentioned a 'quotation for the amount of compensation' and 'the financial offer must be presented as an amount in Euro' and no specific mention was made for the submission of workings, (k) the price offered was the result of a competitive tendering procedure and, ultimately, the contracting authority could have asked for a clarification in this regard, (l) the circumstances of this case did not justify the action which the contracting authority was contemplating, namely to go for a negotiated procedure because, in that case, there had to be 'irregular' and 'unacceptable' tenders and (m) EU Directives stated that (1) 'irregular' tenders were tenders which did not comply with the rules of procurement or tenders the prices of which were manifestly not the result of competitive bidding or tenders which contain one-sided clauses and (2) 'unacceptable' referred to such cases as tenders submitted after the expiry of the deadline or tenderers which did not have the necessary qualifications or bids which were abnormally low - in the case under review there were none of the above-mentioned circumstances;

- having considered the contracting authority's representative's reference to the fact that (a) the tender conditions did not allow the bidder to opt for which port, out of the two requested, to submit its offer, (b) the original title of the tender read '*Tender for the Provision of Maritime Transport Services for Goods Between the Islands of Malta and (A) any one port lying between the ports of Genoa and Reggio Calabria, and (B) the port of Palermo or Catania*', (c) by letter of clarification dated 16th February 2012 (not 2011, since tender was issued on 13th January 2012 plus email dated 16th February 2012 whereby amendment was displayed on website), the title of the tender was altered to read as follows, namely '*Tender for the Provision of Maritime Transport Services for Goods Between the Islands of Malta and (A) any one port lying between the ports of Genoa and Reggio Calabria, and (B) any port in Sicily.*', (d) contrary to what the appellant company was claiming, both the original and the revised title of the tender clearly referred to two ports, namely the bidder could choose (1) one/any port between



Genoa and Reggio Calabria and (2) any port in Sicily (previously either the port of Palermo or Catania), (e) in this case one should stress the importance of the 'comma' after 'Calabria' and before 'and' which clearly and categorically meant that the tender was referring to two ports and, consequently, the bidder had to include two ports in the company's offer, (f) the clarification of the 16th February 2012 went on to state that, throughout the tender document, any reference to the 'port of Palermo or Catania' should be replaced by 'any port in Sicily', (g) clause 1.2 made it quite clear that *"The route required for the purposes of the bid shall be the following ("Route"): between the port of Valletta, Malta and (A) Any One Port lying between the Ports of Genoa and Reggio Calabria, Italy; and (b) any port in Sicily (originally, the Port of Palermo or Catania, Sicily)"* – the 'semicolon' after 'Italy' separated (A) from (B) but then they were linked by 'and', (h) had the contracting authority used 'or' instead of 'and' between (A) and (B) then the bidder would have had the option of one or the other but, in this instance, it was definitely not the case, (i) the contracting authority was clear in its requirements that the route had to include two ports – effectively, the bidder had to choose a route or routes but the route/s had to include calling at two ports not at only one port as was the case with the appellant company's offer, (j) the concluding sentence of clause 1.2 ended by *'are serviced at least twice weekly'* which indicated two ports and not one port, (k) sub-clause 1.5, which was one of the general requirements found under the heading 'Scope of Tender', referred to the provision of compensation which was then further explained in section 3 'Financial Offer', namely *"Bidders are requested to provide" ... "a quotation for the amount of compensation calculated by the bidders as necessary to cover the losses suffered by the bidder to fulfil the obligations provided in the Contract, reference being made to 1.5"*, (l) a quotation represented a breakdown or a calculation and, in this case, a calculation of how the bidder arrived at the amount of compensation which the contracting authority would pay the bidder to run this service by way of public service obligation, (m) clause 1.1 'Rationale', among other things, stated that *"... will offer compensation for such services assessed on the basis of losses that the successful bidder would incur if the routes and schedule in this tender dossier are serviced on a competitive basis..."*, (n) it was evident that the contracting authority did not request only a global amount but it also requested the workings as to how that amount was arrived at, (o) Regulation 59 of the Public Procurement Regulations allowed the contracting authority to resort to a negotiated procedure, in the case of an irregular tender, and the case under review was considered as an irregular tender and (p) the tender called for a route covering two ports and, therefore, the contracting authority could not entertain the bid made by the appellant company which covered only the route Malta-Sicily calling at one port in Sicily

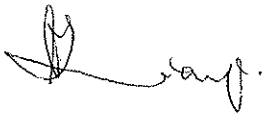
reached the following conclusions, namely:

1. The Public Contracts Review Board recognizes the fact that, once this tender concerned the payment of 'compensation' by way of a public service obligation, then the contracting authority was entitled to have the bidder's workings justifying the amount of subsidy payable because there were various elements that had to be taken into account in the payment of such government subsidies. Taken within the context of full transparency and accountability provisions, a 'quotation' represented a breakdown or a calculation and, in this case, a calculation of how

the bidder would have arrived at the amount of compensation which the contracting authority would pay the bidder to run this service by way of public service obligation. Indeed, this Board agrees with the contracting authority's viewpoint wherein, through, for example, clause 1.1 'Rationale', among other things, it is stated that "... will offer compensation for such services assessed on the basis of losses that the successful bidder would incur if the routes and schedule in this tender dossier are serviced on a competitive basis..." which is more than evident that the contracting authority was not requesting only a global amount but was also requesting the workings as to how that amount was arrived at.

2. The Public Contracts Review Board concurs with the contracting authority's interpretation of the tender requirements which implies that, contrary to what the appellant company was claiming, both the original and the revised title of the tender clearly referred to two ports, namely the bidder could choose (1) one/any port between the preselected ports, namely Genoa and Reggio Calabria and – 'and' meaning, 'as well as' - (2) any port in Sicily (previously either the port of Palermo or Catania). This Board acknowledges that the overriding intention of the tender was for the contracting authority to extend its market presence with its services. Undoubtedly, this Board cannot comprehend the total misinterpretation by the appellant company of the scope of the tender.
3. This Board also opines that this objection was filed in a total frivolous manner considering the absolute clear manifestation of scope governing this particular tender procedure.

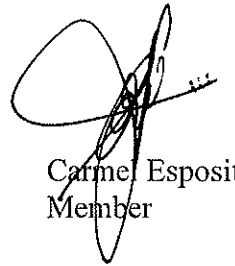
In view of the above this Board finds against the appellant company and recommends that the deposit paid by the same appellant for the appeal to be lodged should not be reimbursed.



Alfred R Triganza
Chairman



Joseph Croker
Member



Carmel Esposito
Member

30 October 2012