

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No: 522**

**CT/3054/2012**

### **Negotiated Procedure – Works Tender for the Construction, Servicing, Finishing and Commissioning of the Childcare Centre and an Administrative Office at Xewkija Industrial Estate**

The call for tender was published on the 4<sup>th</sup> September 2012 with a closing date on the 2<sup>nd</sup> October 2012. The estimated value of the tender amounts to €737,500 excluding VAT, the recommended tenderer's price amounts to €726,188.96 while that the appellant's was €698,705.22.

An objection was filed by VMA Joint Venture on 21 December 2012 against the decision of the Contracts Department to disqualify its offer as administratively non-compliant and to recommend the award of the tender to Central Power Installations Ltd.

The Public Contracts Review Board composed of Mr Joseph Croker, A/Chairman, and Messrs Carmelo Esposito and Paul Mifsud as members convened a public hearing on Monday 18<sup>th</sup> February 2013 to discuss the appeal.

Present:

#### **VMA Joint Venture**

Dr Adrian Delia	Legal Representative
Dr Matthew Pulis	Legal Representative
Mr Raymond Vella	Representative
Mr Joseph Attard	Representative
Mr Joseph Mercieca	Representative

#### **Central Power Installations Ltd**

Dr Carmelo Galea	Legal Representative
Mr Victor Hili	Representative
Mr Dmitry Pechenkin	Representative
Ms Veronica Zammit	Representative

#### **Malta Industrial Parks**

Col. David Mifsud	Chairman, Evaluation Board
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#### **Contracts Department**

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

Dr Adrian Delia, on behalf of VMA Joint Venture, the appellant, made the following submissions:

- i. by letter dated 11th December 2012 his client was informed that his offer was found administratively non-compliant because page 1 of the bills of quantities (underfloor heating) was not found in both the original and copy of the tender submission;
- ii. his client's offer was cheaper than the recommended offer and it was also compliant and that the only reason for disqualification was that mentioned at (i) above;
- iii. the contracting authority was obliged to seek clarifications from bidders and more so in the case of a 'negotiated procedure', however, in this case no clarification was sought, even if, for fairness sake, the contracting authority did open up the copy of the tender submission to check if the missing page from the bill of quantities was there or not – in fact, the outcome was in the negative; and
- iv. the bill of quantities consisted of a number of pages, each with a running balance and therefore, in spite of page 1 being missing, the total value of the bill of quantities/bid did not change, it was easily arrived at and it did not hinder the contracting authority from carrying out its evaluation.

Col. David Mifsud, chairman of the evaluation board, explained that:-

- a. it was correct that the appellant had been disqualified because page 1 of the bill of quantities he presented was missing;
- b. the evaluation process in a 'negotiated procedure' followed the same course as that of an open tender procedure and the contracting authority could not indulge in any negotiations with the bidders during tender evaluation stage;
- c. clause 1.1 of the 'General Instructions' stated, among other things, that: *Tenderers are expected to examine carefully and comply with all instructions, forms, contract provisions and specifications contained in this tender document;*
- d. clause 16.1 (f) (iii) read: *Breakdown of the overall price, in the form provided in Volume 4 (Bill of Quantities)* and in respect of this provision Note 3 applied which stated that: *No rectification shall be allowed. Only clarifications on the submitted information may be requested;*
- e. contrary to what the appellant seemed to imply, in this case it was not a matter of clarification but a rectification because the appellant would have had to submit page 1 of the bill of quantities which he had not submitted in the first instance;

- f. the contracting authority did take action to open up the copy of the tender submission in the presence of representatives of the appellant and of the Contracts Department but the missing page was not traced;
- g. one had to keep in view also that page 1 of the bill of quantities contained various rates and one could not just assume or guess what those rates actually were and, those same rates assumed a degree of importance in the light of clause 31.1 (b) which provided that: *Where there is a discrepancy between a unit price and the total amount derived from the multiplication of the unit price and the quantity, the unit price as quoted will prevail* and in the light of clause 31.2 which stated that: *The amount stated in the tender will be adjusted by the Evaluation Committee in the event of error, and the tenderer will be bound by that adjusted amount* – which meant that the rates could change the overall price; and
- h. in such circumstances, the evaluation board had no option but to disqualify the bid.

Dr Carmelo Galea, on behalf of the recommended bidder, submitted that:-

- i. a contracting authority could resort to a negotiated procedure when, following an open tender procedure none of the bidders would be administratively compliant and in so doing all bidders who participated in the open tender would be invited to re-submit an offer but from the closing date for tender submission onwards the negotiated procedure followed the same rules of the open tender procedure;
- ii. the bill of quantities had a bearing on the overall price and was also useful when the contracting authority would come to issue payments because it would have to check the claim against the awarded rates, something which it would not be able to do in the absence of a complete bill of quantities;
- iii. last para. of clause 1.1 of the ‘General Instructions’ stated that: *No rectifications shall be allowed in respect of the documentation as outlined in sub-clause 16.1 (d) (e) and (f) of these instructions to tenderers. Only clarifications on the submitted information in respect of the latter may be eventually requested.*

Dr Delia put forward the following arguments:-

- a. if one were to be too rigid during adjudication then most of the tenders would end up being cancelled;
- b. according to regulations: *"negotiated procedures" means those procedures whereby contracting authorities consult the economic operators of their choice and negotiate the terms of a contract with one or more of these;*
- c. in the case of his client the total of page 1 amounted to €5,496 when the total value of the bid amounted to €698,705.22;

- d. since the total of each page of the bill of quantities was carried forward to the next page then the total cost of the bill of quantities could be arrived at and the evaluation of the tender could be carried out;
- e. one would have been correct to exclude a bidder if he failed to submit the bill of quantities but it was another thing if only a small part thereof was not submitted and that shortcoming did not prevent the contracting authority from arriving at the total value of the offer;
- f. therefore, in a negotiated procedure, contrary to an open tender procedure, the contracting authority was allowed to negotiate and in this particular case the contracting authority had the leeway to negotiate with his client to correct this shortcoming which had no bearing on the total quoted price; and
- g. this was a clear case of ‘substance over form’ which the PCRB had stressed upon in several other cases.

Col. Mifsud clarified that:-

- i. the term ‘*contracting authorities consult the economic operators of their choice and negotiate*’ meant that the contracting authority could consult/negotiate prior to the closing date of the tender but certainly not at adjudication stage;
- ii. the matter under reference amounted to a rectification, i.e the submission of more information and not to a clarification on information already submitted;
- iii. a contracting authority would opt for a negotiated procedure when it would realise that notwithstanding the shortcomings, the bidders had the capacity to carry out the contract.

Mr Jonathan Barbara, representing the Contracts Authority, under oath, stated that:

- a. in the case of an open tender procedure where no bidder/s would be found compliant, the evaluation committee could recommend to the General Contracts Committee that instead of re-issuing the tender one would resort to a ‘negotiated procedure’ in which only those bidders who had participated in the open tender procedure would be allowed to tender and any one of those bidders could opt not to participate in the negotiated procedure; and
- b. a negotiated procedure would kick off by the contracting authority meeting the bidders to explain to them in general terms the shortcomings of the submissions they made in the open tender procedure following which a fresh tender document with the same technical specifications would be handed out to them to fill in and submit their new offer by the established closing date and, from then on, a negotiated procedure would follow the same rules as an open tender procedure.

Dr Delia concluded that:-

- i. the content of page 1 of the bill of quantities was not a mandatory requirement and, moreover, that shortcoming did not hinder the evaluation board in carrying out its evaluation of the offer;
- ii. from the tenderers who had participated in the open tendering procedure only two submitted an offer in the negotiated procedure and as such these two participating tenderers qualified as the economic operators of the contracting authority's choice with whom the same contracting authority could consult/negotiate; and
- iii. in one of its decisions the European Court of Justice stated that: *contracting authorities shall negotiate with tenderers the tender submitted by them in order to adapt them to the requirements which they had set out in the contract notice, the tender document and other documents, if any, and to seek out the best tender.*

Col. Mifsud concluded that (i) the adaptation stage mentioned by Dr Delia had in fact taken place during the information meeting which the contracting authority held with the bidders but that was prior to submitting their tender and (ii) in this case the incomplete document was equivalent to the non-submission of the document.

This Board:

- Having noted that the appellants in terms of their letter of objection and also through their verbal submissions during the hearing of the 18<sup>th</sup> February 2013 had objected to the decision taken by the Department of Contracts to disqualify them as administratively non-compliant;
- Having noted the appellant's representatives claims and observations in particular to the fact that the non-submission of one page of the Bill of Quantities did not necessarily invalidate a bid for the simple reason that there was a running balance carried forward from one page to another and one could easily arrive at the value on the missing page; that in a negotiated procedure the contracting authority was obliged to seek clarifications from the bidders; that though the submission of the Bill of Quantities was mandatory, the missing page was not;
- Having noted the contracting authority's submissions that the negotiated procedure followed an identical course as that of an open tender; that clause 1.1. of the General Instructions emphasised that *Tenderers are expected to examine carefully and comply with all instructions, forms, contract provisions and specifications contained in this tender document;* that no rectification was permissible where the submission of the Bill of Quantities was concerned and that the insertion of a missing page from the Bill post submission of the tender document would have been tantamount to a rectification; that the missing page contained information which would have been essential when verifying invoices for payment;

- Having noted the explanation given by the representative of the Department of Contracts to the effect that in a negotiated procedure one had to follow the same procedure applicable to open calls for tenders and there that no leeway was envisaged;

came to the following conclusions:

1. that the fact that page one of the Bill of Quantities was missing from the submission was not in dispute so much so that it was also missing from the sealed envelope containing the copy of the appellant's tender document and which envelope was opened in the appellant's presence;
2. that the negotiated procedure did not imply that the rules normally applicable to an open tender may be suspended;
3. that the missing document was an integral component of the Bill of Quantities and had to be submitted with the tender document without any means of rectification should one fail to include it in the documentation.

In view of the above, the Board finds against the appellant and recommends that the deposit paid to file the objection be forfeited.

Joseph Croker  
A/Chairman

Carmelo Esposito  
Member

Paul Mifsud  
Member

*27 February 2013*