

PUBLIC CONTRACTS REVIEW BOARD

Case No. 550

CT/3004/2012

Negotiated Procedure: Tender for the Design, Fabrication, Construction and Erection of a Protective Shelter over the Tarxien Megalithic Temples

The call for tender, with an estimated value of €1,230,000 (excl. VAT), was published in the Government Gazette of the 10th April 2012 with a closing date of the 17th May 2012. Four (4) tenderers submitted their offers.

Pillow Space Frame Ltd filed an objection on 4th March 2013 against the decision of the Contracts Department to recommend the award of tender to Malta Restoration JV.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Joseph Croker and Mr Carmelo Esposito as members convened a meeting on Wednesday 15th May 2013 to discuss the appeal in the presence of:

Pillow Space Frame Ltd

Dr Godwin Muscat Azzopardi	Legal Representative
Mr Martin Pillow	Managing Director
Mr Pierre Abela	Representative

Steel Shape Ltd – interested party

Dr John Gauci	Legal Representative
Mr Ivan Coleiro	Representative
Mr Iomar Vella	Representative
Mr Joseph Vella	Representative

Malta Restoration JV – recommended tenderer

Dr Massimo Vella	Legal Representative
Dr David Vella	Legal Representative
Ing. Johann Bondin	Representative
Architect Mark Camilleri	Representative
Mr Francis Vella	Representative

Contracts Department

Mr Jonathan Barbara	Procurement Manager
---------------------	---------------------

Planning and Priorities Coordination Department – Office of the Prime Minister and Heritage Malta

Dr Ruth Baldacchino	Legal Representative
Dr Patrick Valentino	Legal Representative

Evaluation Board

Ms Joanne Mallia	Chairperson
Architect Ruben Abela	Member
Mr Reuben Grima	Member
Ms Katya Stroud	Member
Mr Kevin Abela	Secretary

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

Dr Godwin Muscat Azzopardi, legal advisor of Pillow Space Frame Ltd, the appellant company, made the following submissions:-

- i. by letter dated 22nd February 2013 the Contracts Department informed the appellant company that its offer had been ranked second and that the award of the tender was recommended in favour of Malta Restoration JV;

and

- ii. the appellant company was objecting for two main reasons, (a) the recommended bidder had not submitted the original bid bond in the open tender procedure which rendered its bid to be administrative non-compliant and, as a result, should not have been allowed to participate in the negotiated procedure and (b) the recommended bidder in the negotiated procedure had not participated in the original open tender.

A) The Recommended Bidder had not Submitted the Original Bid Bond in the Original Open Tender Procedure

Dr Muscat Azzopardi stated that:-

- a. in the 'Schedule of Tenders Received' pertaining to the original open tender procedure there was a note against the name of the recommended bidder, namely Malta Restoration JV, in the sense that it had not submitted an original bid bond;

and

- b. whilst, in the light of that shortcoming, the recommended bidder should have been disqualified as it was not administratively compliant, yet, this bidder had been allowed to participate in the negotiated procedure and, subsequently, its offer was recommended for award.

Dr Patrick Valentino, legal advisor of Heritage Malta, stated that it was correct for one to state that the appellant company had not submitted the original bid bond in the open tender procedure so much so that the company was disqualified from that tendering process. He added that, for all that matters, the tenderers who participated in the open tender procedure had been disqualified for one reason or other, except for one, but, then again, the offer of this compliant tenderer was too much on the high side and, as a result, it had to be refused for being well above the budget of Heritage Malta.

Ms Joanne Mallia, chairperson of the evaluation board, confirmed that:-

- i. the open tender procedure had been cancelled because all offers received were found to be administratively or technically non-

compliant except for one which, then again, was well beyond the budget and had likewise to be discarded;

- ii. it was then recommended to the Contracts Department to go for the negotiated procedure whereby all the bidders who participated in the open tender procedure were invited to take part and, in fact, they all did except for the compliant tenderer whose offer was too expensive;

and

- iii. although the appellant company's bid in the open tender procedure was non-compliant, yet in the negotiated procedure it submitted the information which was missing in its original submission and that opportunity was available to all the other bidders participating in the negotiated procedure.

Mr Jonathan Barbara, representing the Contracts Department, under oath, confirmed that the bid bond submitted by Malta Restoration JV in connection with the open tender procedure was a copy and not the original and that was the reason, or one of the reasons, for its disqualification from the open tender procedure.

The Chairman Public Contracts Review Board observed that there must have been something wrong with the department's estimate which was put at €1,230,000, excluding VAT, whereas the only compliant bid amounted to €3,499,811.63 and the recommended bid amounted to €2,239,435, after evidently reviewing the scope of works.

B) The Recommended Bidder did not Participate in the Original Open Tender.

Dr Muscat Azzopardi stated that:-

- i. the recommended bidder, namely Malta Restoration JV, did not appear on the Schedule of Tenders Received of the open tender procedure and the appellant company client had drawn the attention of the contracting authority that one of the tenderers who was participating in the negotiated procedure had not participated in the original open tender procedure and, as a consequence, it should not have been invited to take part in the negotiated procedure;

- ii. although this communication was acknowledged to have been received by Heritage Malta and that it had been forwarded to the Contracts Departments, still, it remained unanswered;

and

- iii. at one stage the contracting authority released information that the Contracts Department, by mistake, had listed on the Schedule of Tenders Received the name of the lead partner instead of the joint

venture and, in the circumstances, it had requested confirmation from the Contracts Department as to whether by error it had put down the name of the lead partner instead of that of the joint venture itself.

Dr Ruth Baldacchino, also representing the contracting authority, explained that the Contracts Department officer who filled in the Schedule of Tenders Received, which was eventually displayed on the Contracts Department's notice board, in the case of Malta Restoration JV, erroneously, quoted the name of the lead partner instead of the name of the joint venture.

Ms Joanne Mallia, chairperson of the evaluation board, confirmed that since the evaluation board could not communicate with the bidders, it had informed the Contracts Department that the name of one of the bidders, namely Malta Restoration JV, had been erroneously quoted in the Schedule of Tenders Received.

Dr Muscat Azzopardi argued that had his client been informed of the correct state of affairs it would have raised other queries in its letter of objection such as the fact that the lead partner had to undertake 50% of the works when, according to its website, the lead partner of the recommended bidder only employed five to six persons. He added that it was at this hearing that the appellant company has learned that the name of the lead partner had been mistakenly listed instead of that of the recommended tenderer, Malta Restoration JV.

Mr Barbara, under oath, confirmed that when drawing up the Schedule of Tenders Received, the department, by mistake, displayed the name of the lead partner instead of that of the joint venture.

Dr Massimo Vella, legal representative of the recommended tenderer, submitted that:-

- i. the only requirement for a bidder to participate in the negotiated procedure was that the bidder had participated in the open tendering procedure and that requirement had been satisfied by the recommended tenderer, especially once it had been made clear once that a mistake had been committed when the contracting authority drew up the Schedule of Tenders Received;
- ii. the recommended tendering joint venture had been disqualified due to technical shortcomings and not because it had submitted a copy instead of the original bid bond;

and

- iii. none of the tenderers who had participated in the open tendering procedure had challenged within the prescribed time the cancellation of that procedure or had objected as to why a bidder had qualified administratively when it should not have qualified and therefore the open tender procedure should be considered a closed chapter.

Dr Muscat Azzopardi insisted that the recommended bidder should not have been allowed to participate in the negotiated procedure because clause 20.1 stated, among other things, that ‘the guarantee must be an original ..’ and that “Offers that are not accompanied with the mandatory Tender Guarantee by the closing date and time of the tender will be automatically disqualified.”

Mr Barbara stated that once the open tender procedure was cancelled then that was considered a closed case and that the negotiated procedure was a new process altogether except that the participants had to be the same bidders who participated in the open tender procedure. He added that the evaluation board of Heritage Malta had recommended that it proceeds with the negotiated procedure which recommendation was accepted by the General Contracts Committee.

Mr Martin Pillow, also representing Pillow Space Frame Ltd, remarked that:-

- a. at the meeting held on site only three out of the six bidders participating in the negotiated procedure were present;
 - b. albeit the contracting authority had hinted that its budget for these works was limited, yet it refrained from, officially, divulging the estimated value of works
 - c. if one were to take the bid bond as a yardstick, then the estimated value was of about €1.2 million;
 - d. the appellant company had quoted the price of almost €3.5 million and it was considered to be rather on the conservative side given the complexity of the works involved and, as a result, the appellant company opined that both the department’s estimate of €1.2 million and the recommended price of €2.588 million were unrealistic;
- and
- e. one feared that the recommended joint venture would not be able to execute this contract as per published specifications given that the lead partner employed only 5 to 6 persons and had to undertake 50% of the works.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its ‘reasoned letter of objection’ dated the 1st March 2013 and also through its representatives verbal submissions presented during the hearing held on the 15th May 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 22nd February 2013 the Contracts Department informed the appellant company that its offer had been ranked second and that the award of the tender was recommended in favour of Malta Restoration JV, (b) the appellant company was objecting for two main reasons, (1) the recommended bidder had not submitted the original bid bond in the open tender procedure which rendered its bid to be administrative non-compliant and, as a result, should not have been allowed to participate in the negotiated procedure and (2) the recommended bidder in the negotiated procedure had not participated in the original open tender, (c) in the 'Schedule of Tenders Received' pertaining to the original open tender procedure there was a note against the name of the recommended bidder, namely Malta Restoration JV, in the sense that it had not submitted an original bid bond, (d) whilst, in the light of that shortcoming, the recommended bidder should have been disqualified as it was not administratively compliant, yet, this bidder had been allowed to participate in the negotiated procedure and, subsequently, its offer was recommended for award, (e) the recommended bidder, namely Malta Restoration JV, did not appear on the Schedule of Tenders Received of the open tender procedure and the appellant company client had drawn the attention of the contracting authority that one of the tenderers who was participating in the negotiated procedure had not participated in the original open tender procedure and, as a consequence, it should not have been invited to take part in the negotiated procedure, (f) although this communication was acknowledged to have been received by Heritage Malta and that it had been forwarded to the Contracts Departments, still, it remained unanswered, (g) at one stage the contracting authority released information that the Contracts Department, by mistake, had listed on the Schedule of Tenders Received the name of the lead partner instead of the joint venture and, in the circumstances, it had requested confirmation from the Contracts Department as to whether by error it had put down the name of the lead partner instead of that of the joint venture itself, (h) had it been informed of the correct state of affairs it would have raised other queries in its letter of objection such as the fact that (1) the lead partner had to undertake 50% of the works when, according to its website, the lead partner of the recommended bidder only employed five to six persons and (2) it was at this hearing that the appellant company has learned that the name of the lead partner had been mistakenly listed instead of that of the recommended tenderer, Malta Restoration JV, (i) the recommended bidder should not have been allowed to participate in the negotiated procedure because clause 20.1 stated, among other things, that 'the guarantee must be an original ..' and that "Offers that are not accompanied with the mandatory Tender Guarantee by the closing date and time of the tender will be automatically disqualified", (i) at the meeting held on site only three out of the six bidders participating in the negotiated procedure were present, (j) albeit the contracting authority had hinted that its budget for these works was limited, yet it refrained from, officially, divulging the estimated value of works, (k) if one were to take the bid bond as a yardstick, then the estimated value was of about €1.2 million, (l) the appellant company had quoted the price of almost €3.5 million and it was considered to be rather on the conservative side given the complexity of the works involved and, as a result, the appellant company opined that both the department's estimate of €1.2 million and the recommended price of €2.588 million were unrealistic and (m) one feared that the recommended joint venture would not be able to execute this contract as per published specifications given that the lead partner employed only 5 to 6 persons and had to undertake 50% of the works;

- having considered the contracting authority's representative's reference to the fact that (a) it was correct for one to state that (1) the appellant company had not submitted the original bid bond in the open tender procedure so much so that the company was disqualified from that tendering process and (2) for all that matters, the tenderers who participated in the open tender procedure had been disqualified for one reason or other, except for one, but, then again, the offer of this compliant tenderer was too much on the high side and, as a result, it had to be refused for being well above the budget of Heritage Malta, (b) the open tender procedure had been cancelled because all offers received were found to be administratively or technically non-compliant except for one which, then again, was well beyond the budget and had likewise to be discarded, (c) it was then recommended to the Contracts Department to go for the negotiated procedure whereby all the bidders who participated in the open tender procedure were invited to take part and, in fact, they all did except for the compliant tenderer whose offer was too expensive, (d) although the appellant company's bid in the open tender procedure was non-compliant, yet in the negotiated procedure it submitted the information which was missing in its original submission and that opportunity was available to all the other bidders participating in the negotiated procedure, (e) the Contracts Department officer who filled in the Schedule of Tenders Received, which was eventually displayed on the Contracts Department's notice board, in the case of Malta Restoration JV, erroneously, quoted the name of the lead partner instead of the name of the joint venture and (f) since the evaluation board could not communicate with the bidders, it had informed the Contracts Department that the name of one of the bidders, namely Malta Restoration JV, had been erroneously quoted in the Schedule of Tenders Received;
- having also considered the department of contract's representative's testimony, particularly the references made to the fact that (a) the bid bond submitted by Malta Restoration JV in connection with the open tender procedure was a copy and not the original and that was the reason, or one of the reasons, for its disqualification from the open tender procedure, (b) when drawing up the Schedule of Tenders Received, the department, by mistake, displayed the name of the lead partner instead of that of the joint venture and (c) once the open tender procedure was cancelled then that was considered a closed case and that (1) the negotiated procedure was a new process altogether except that the participants had to be the same bidders who participated in the open tender procedure and (2) the evaluation board of Heritage Malta had recommended that it proceeds with the negotiated procedure which recommendation was accepted by the General Contracts Committee;
- having also considered the recommended tenderer's representative's reference to the fact that (a) the only requirement for a bidder to participate in the negotiated procedure was that the bidder had participated in the open tendering procedure and that requirement had been satisfied by the recommended tenderer, especially once it had been made clear that a mistake had been committed when the contracting authority drew up the Schedule of Tenders Received, (b) the recommended tendering joint venture had been disqualified due to technical shortcomings and not because it had submitted a copy instead of the original bid bond and (c) none of the tenderers who had participated in the open tendering procedure had challenged within the prescribed time the cancellation of that procedure or had objected as to why a bidder had qualified administratively when it should not have qualified and therefore the open tender procedure should be considered a closed chapter

reached the following conclusions, namely:

1. The Public Contracts Review Board observes that there must have been something wrong with the department's estimate which was put at €1,230,000, excluding VAT, whereas the only compliant bid amounted to €3,499,811.63 and the recommended bid amounted to €2,239,435, after, evidently, reviewing the scope of works.
2. The Public Contracts Review Board concurs with the procedure adopted by the contracting authority wherein, as a result of the fact that tenderers who had participated in the open tender procedure - except for one whose offer, albeit compliant, was too much on the high side - and who, for one reason or other, had been disqualified, the contracting authority decided to recommend to the Contracts Department to go for the negotiated procedure whereby all the said bidders were invited to take part and, in fact, they all did (except for the compliant tenderer whose offer was too expensive).
3. The Public Contracts Review Board opines that, despite the fact that, in the same way that the appellant company's bid in the open tender procedure was considered to be non-compliant, yet, since in the negotiated procedure it submitted the information which was missing in its original submission, then it was right for the contracting authority to allow it to participate but, at the same time, ensure that this opportunity - negotiated procedure - be equally made available to all the other bidders who had participated in the open tender procedure as, after all, all such bidders were considered as non compliant in the first instance.
4. The Public Contracts Review Board opines that the explanation given under oath by the Contracts Department officer regarding the fact that the 'Schedule of Tenders Received', which was eventually displayed on the Contracts Department's notice board, in the case of Malta Restoration JV, had erroneously quoted the name of the lead partner instead of the name of the joint venture, was credible enough.

In view of the above this Board finds against the appellant company. Furthermore, this Board recommends that the appellant company shall forfeit the deposit paid to lodge the appeal.

Alfred R Triganza
Chairman

Joseph Croker
Member

Carmelo Esposito
Member

22 May 2013