

PUBLIC CONTRACTS REVIEW BOARD

Case No. 555

T 1/2013

Tender for the Leasing of Thirty-Seven A4 Energy Efficient Black & White Multifunction Printing Devices including Full Service Maintenance Agreement (FSMS) over a period of three years within the Ministry of Justice, Dialogue and the Family (MJDF)

This call for tenders was published in the Government Gazette on the 8th January 2013. The closing date for this call with an estimated budget of €20,000 (excl. VAT) was the 1st February 2013.

Four (4) tenderers submitted their offers.

Office Group Ltd filed an objection on the 14th March 2013 against the decision of the Ministry of Justice, Dialogue and the Family to recommend the award of the tender to Strand Electronics Ltd.

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 Wednesday, 22nd May 2013 to discuss this objection.

Present for the hearing were:

Office Group Ltd

Dr Lorna Mifsud Cachia	Legal Representative
Mr Joseph Camilleri	Corporate Solutions Executive
Mr Steve Holland	Representative

Strand Electronics Ltd

Mr Ray Azzopardi	Sales Manager, Office Equipment
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Ministry for Justice, Dialogue and the Family (MJDF)

Mr John Degiorgio	Director Corporate Services
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Evaluation Board

Mr Clifford Schembri	Chairman
Mr Jean Paul St. John	Member
Mr Jesmond Mugliett	Member
Mr Jason Zammit	Member

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

Dr Lorna Mifsud Cachia, legal advisor of Office Group Ltd, the appellant company, made the following submissions:-

- i. by notice dated 5th March 2013 the contracting authority announced that the tender was being awarded to Strand Electronics Ltd at the rate of €0.02124 per copy;
- ii. given the substantial difference between the awarded price and the other offers submitted, it was being assumed, or, it was most likely, that the recommended tenderer might have not satisfied all of the tender specifications and, therefore, for the sake of transparency and fair hearing, which principles were enshrined in legislation, the contracting authority was called upon to indicate at this stage the make and model of the equipment offered by the recommended tenderer;
- iii. the appellant company did not have information on the equipment offered by participating tenderers and when it requested such information it was referred to clause 28.2 of the 'Instructions to Tenders' which stated that

'Information concerning checking, explanations, opinions and comparison of tenders and recommendations concerning the award of contract, may not be disclosed to tenderers or any other person not officially involved in the process unless otherwise permitted or required by law'

Nevertheless, Dr Mifsud Cachia contended that the information requested by the appellant company did not fall under this category;

As a matter of fact, continued Dr Mifsud Cachia, clause 28.1 provided that

'After the opening of the tenders, no information about the examination, clarification, evaluation or comparison of tenders or decisions about the contract award may be disclosed before the notification of award'

Therefore, stated Dr Mifsud Cachia, clause 28.1 made it clear that no information could be made available about the evaluation process itself 'before the notification of award' and that meant that, after the notification of award, the contracting authority was allowed to give certain information even about the 'evaluation or comparison of tenders';

- iv. the appellant company visited the website of the winning bidder and it discovered that none of the equipment displayed could meet the high standards requested in the tender specifications;

and

- v. on the other hand, the appellant company had satisfied the tender specifications by offering the appropriate kind of equipment.

Mr John Degiorgio, representing the contracting authority, remarked that:-

- a. all the four participating bids were found to be technically compliant and, as a result, the award was then decided upon on the basis of the cheapest price as per clause 32.1 of the tender document;

and

- b. the evaluation board did receive a request for information from the appellant company about the type of machine/s offered by the recommended bidder about which it had sought the advice of the Contracts Department, which, as per email dated 12th March 2013, read as follows

“When communicating with unsuccessful bidders we give them the reasons for their offer being rejected or not being awarded the contract but not information about the offer submitted by the successful bidder”

and the appellant was made aware of this advice.

Mr Clifford Schembri, chief information officer and chairman of the evaluation board, explained that:-

- i. the technical evaluation was carried out by comparing the equipment offered by each tenderer against a template which was provided in the tender document itself at Annex I of Volume 3 Section 1;

and

- ii. as an additional safeguard, the tender document also requested the submission of an undertaking by the manufacturer/supplier that the equipment offered met the tender specifications and to indicate where those specifications could be traced in the technical brochure.

The Chairman Public Contracts Review Board remarked that the appellant company had the right to know what equipment was offered by the other bidder/s as otherwise one would not be able to conclude whether there were sufficient grounds to lodge an appeal. In view of this the Chairman took it upon himself to inform the appellant company’s representative/s that the type of equipment offered by the recommended tenderer was ‘*Kyocera FS-3140MFP+*’.

Dr Mifsud Cachia presented the technical brochure relative to ‘*Kryocera FS-3140MFP+*’ offered by the recommended tenderer - which matched that submitted by the recommended tenderer in its tender submission - and she pointed out that:

- a. with regard to the 'paper weight' this equipment supported 60-120 g/m² whereas the tender specified 60-200 g/m²;
 - b. the appellant company offered equipment which met the specification 60-200 g/m² and that rendered the equipment much more expensive than the one offered by the recommended tenderer which met the lower standard of 60-120 g/m²;
- and
- c. the appellant company could have offered cheaper machines which met the 60-120 g/m² specification but that would not have been up to tender specifications.

Mr Schembri noted that against "Input capacity" the technical brochure indicated "100-sheet multi-purpose tray, 60-220 g/m²", which did meet the tender specifications under 'paper capacity';

Dr Mifsud Cachia however pointed out that:-

- i. the same brochure also read "500-sheet universal paper cassette, 60-120 g/m²" and that against 'Paper handling' Annex I of the tender document indicated "1 tray for A4 size Paper – capacity 500 sheets" and right under it under "Paper Weight" it specified "60-200 g/m²";
- and
- ii. the machine had two feeding trays, one 100-sheet tray and one 500-sheet tray, and the tender document was requesting 60-200 g/m² paper with regard to both feeding trays.

The Chairman Public Contracts Review Board recapitulated that from Dr Mifsud Cachia's submission it appeared that the equipment offered by the preferred bidder supported 60-220 g/m² as to the 100-sheet multi-purpose tray whereas it supported 60-120 g/m² as to the 500-sheet universal paper cassette, where the latter fell outside the 60-200 g/m² indicated in the tender specifications.

Mr Ray Azzopardi, representing the recommended tenderer, explained that whilst the equipment offered supported 60-120 g/m² paper in the 'duplex unit', yet the 'Input capacity' could go up to 60-220 g/m².

Mr Joseph Camilleri, also on behalf of the appellant company, pointed out that the equipment offered supported 60-200 g/m² paper and, as a consequence, it was compliant and superior to that offered by the preferred bidder which only supported 60-120 g/m² paper.

Mr Jean Paul St. John, representing the contracting authority, explained that:-

- a. the equipment requested had to have one 100-sheet tray and one 500-sheet tray and the recommended equipment met that requirement;

- b. the crux of the matter was that the specification '60-200 g/m²' represented a 'range' which applied to both the 100-sheet and the 500-sheet trays;
- c. by way of minimum specifications the equipment was meant to support paper ranging from 60-200 g/m² paper with regard to both paper trays and the equipment offered by the preferred bidder supported 60-120 g/m² paper which fell within the requested range and so the bid was compliant;
- d. anything above the minimum specifications would render the equipment equally compliant but with superior specifications;

and

- e. if bidders encountered difficulty in the interpretation of the specifications they could have asked for a clarification.

The Chairman Public Contracts Review Board remarked that, whilst it could be the case that the appellant company's offered equipment of a superior quality which could support paper up to 200 g/m², yet, on the other hand, the equipment offered by the preferred bidder supported 60-120 g/m² paper which did fall within the range specified in the tender.

Dr Mifsud Cachia concluded that:-

- i. the interpretation being given by the contracting authority at the hearing was not reflected in the tender document or else it was ambiguous so much so that judging from the offers received, apparently all the bidders except the preferred bidder, interpreted the specifications in such a way that the equipment had to support paper up to 200 g/m²;
- ii. if the tender document had reflected the contracting authority's intentions expressed at the hearing the appellant company would have offered compliant equipment at a much cheaper price;

and

- iii. the published specifications were quite clear and there was no need for a clarification in that regard.

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 11th March 2013 and also through its representatives verbal submissions presented during the hearing held on the 22nd 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 notice dated 5th March 2013 the contracting authority announced that the tender was being awarded to Strand Electronics Ltd at the rate of €0.02124 per copy, (b) given the substantial difference between the awarded price and the other offers submitted, it was being assumed, or, it was most likely, that the recommended tenderer might have not satisfied all of the tender specifications and, therefore, for the sake of transparency and fair hearing, which principles were enshrined in legislation, the contracting authority was called upon to indicate at this stage the make and model of the equipment offered by the recommended tenderer, (c) the appellant company did not have information on the equipment offered by participating tenderers and when it requested such information it was referred to clause 28.2 of the 'Instructions to Tenders' which stated that *'Information concerning checking, explanations, opinions and comparison of tenders and recommendations concerning the award of contract, may not be disclosed to tenderers or any other person not officially involved in the process unless otherwise permitted or required by law'*, (d) the information requested by the appellant company did not fall under the category referred to in clause 28.2 and that, as a matter of fact, clause 28.1 provided that *'After the opening of the tenders, no information about the examination, clarification, evaluation or comparison of tenders or decisions about the contract award may be disclosed before the notification of award'*, (f) clause 28.1 made it clear that no information could be made available about the evaluation process itself 'before the notification of award' and that meant that, after the notification of award, the contracting authority was allowed to give certain information even about the 'evaluation or comparison of tenders', (g) the appellant company visited the website of the winning bidder and it discovered that none of the equipment displayed could meet the high standards requested in the tender specifications, (h) on the other hand, the appellant company had satisfied the tender specifications by offering the appropriate kind of equipment, (i) the technical brochure presented by the recommended tenderer during the hearing - which matched that submitted by the recommended tenderer in its tender submission - referred, amongst other things, to *'Kryocera FS-3140MFP+'* - namely, the model being offered by the recommended tenderer, which highlighted the fact that the 'paper weight' this equipment supported fell within the 60-120 g/m² parameter, whereas the tender specified 60-200 g/m², (j) the appellant company offered equipment which met the specification 60-200 g/m² and that rendered the equipment much more expensive than the one offered by the recommended tenderer which met the lower standard of 60-120 g/m², (k) the appellant company could have offered cheaper machines which met the 60-120 g/m² specification but that would not have been up to tender specifications, (l) the same brochure also read "500-sheet universal paper cassette, 60-120 g/m²" and that against 'Paper handling' Annex I of the tender document indicated "1 tray for A4 size Paper - capacity 500 sheets" and right under it, under "'Paper Weight'", it specified "60-200 g/m²", (m) the machine had two feeding trays, one 100-sheet tray and one 500-sheet tray, and the tender document was requesting 60-200 g/m² paper with regard to both feeding trays, (n) the equipment offered supported 60-200 g/m² paper and, as a consequence, it was compliant and superior to that offered by the preferred bidder which only supported 60-120 g/m² paper, (o) the interpretation being given by the contracting authority at the hearing was not reflected in the tender document or else it was ambiguous so much so that,

judging from the offers received, apparently, all the bidders except the preferred bidder, interpreted the specifications in such a way that the equipment had to support paper up to 200 g/m², (p) if the tender document had reflected the contracting authority's intentions expressed at the hearing the appellant company would have offered compliant equipment at a much cheaper price and (q) the published specifications were quite clear and there was need for a clarification in that regard;

- having considered the contracting authority's reference to the fact that (a) all the four participating bids were found to be technically compliant and, as a result, the award was then decided upon on the basis of the cheapest price as per clause 32.1 of the tender document, (b) the evaluation board did receive a request for information from the appellant company about the type of machine/s offered by the recommended bidder about which it had sought the advice of the Contracts Department, which, as per email dated 12th March 2013, stated that when "... communicating with unsuccessful bidders we give them the reasons for their offer being rejected or not being awarded the contract but not information about the offer submitted by the successful bidder" and the appellant company was made aware of this advice, (c) the technical evaluation was carried out by comparing the equipment offered by each tenderer against a template which was provided in the tender document itself at Annex I of Volume 3 Section 1, (d) as an additional safeguard, the tender document also requested the tenderer to (1) submit an undertaking by the manufacturer/supplier that the equipment offered met the tender specifications and (2) indicate where those specifications could be traced in the technical brochure, (e) against "Input capacity" the technical brochure indicated "100-sheet multi-purpose tray, 60-220 g/m²", which did meet the tender specifications under 'paper capacity', (f) the equipment requested had to have one 100-sheet tray and one 500-sheet tray and the recommended equipment met that requirement, (g) the crux of the matter was that the specification '60-200 g/m²' represented a 'range' which applied to both the 100-sheet and the 500-sheet trays, (h) by way of minimum specifications the equipment was meant to support paper ranging from 60-200 g/m² paper with regard to both paper trays and the equipment offered by the preferred bidder supported 60-120 g/m² paper which fell within the requested range and so the bid was compliant, (i) anything above the minimum specifications would render the equipment equally compliant but with superior specifications and (j) if bidders encountered difficulty in the interpretation of the specifications they could have asked for a clarification;
- having also considered the recommended tenderer's reference to the fact that whilst the equipment offered supported 60-120 g/m² paper in the 'duplex unit', yet the 'Input capacity' could go up to 60-220 g/m²,

reached the following conclusions, namely:

1. The Public Contracts Review Board remarked that the appellant company had the right to know what equipment was offered by the other bidder/s as, otherwise, one would not be able to conclude whether there were sufficient grounds to lodge an appeal. In this instance this Board concludes that the contracting authority should have acted in a more transparent manner.

2. The Chairman Public Contracts Review Board remarked that, whilst it could be the case that the appellant company's offered equipment of a superior quality which could support paper up to 200 g/m², yet, on the other hand, the equipment offered by the preferred bidder supported 60-120 g/m² paper (and 60-220 g/m²), which did fall within the range specified in the tender.
3. This Board takes full cognisance of the fact that the crux of the matter was in fact that the specification '60-200 g/m²' represented a 'range' which applied to both the 100-sheet and the 500-sheet trays. In this regard this Board feels that, by way of minimum specifications, the equipment was meant to support paper ranging from 60-200 g/m² paper with regard to both paper trays and this Board contends that the equipment offered by the preferred bidder supported 60-120 g/m² paper which fell within the requested range and so the bid was compliant.

In view of the above this Board finds against the appellant company but, considering that the said appellant was forced to file an appeal due to lack of access to basic records which would have allowed the company to establish a proper way forward, recommends that the deposit paid by the same company for the appeal to be lodged should be reimbursed.

Alfred R Triganza
Chairman

Joseph Croker
Member

Carmel Esposito
Member

31st May 2013