

PUBLIC CONTRACTS REVIEW BOARD

Case No. 579

CT 3115/2012

Tender for the Supply, Delivery and Installation of College (Lecture room, Laboratory, Office, Staffroom, Auditorium) Furniture and Equipment. The tender was published on the 4th December 2012. The closing date was the 29th January 2013.

The estimated value of the Tender was €2,010,858.07 (Inclusive of VAT).

Eleven Bidders (11) bidders submitted their offers for eight (8) Lots.

Lot 4 Executive and non executive Furniture

On the 28th June 2013, Inspirations Limited, filed an objection against decision to discard its bid as being administratively non compliant and the award of Lot 4 of the tender to FX Borg Furniture Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 6th August 2013 to discuss the appeal.

Present for the hearing:

Inspirations Limited - Appellant

Mr Alex Camilleri	Representative
Mr Emvin Ebejer	Representative
Dr Stanley Portelli	Legal representative

FX Borg Furniture Limited – Recommended Bidder

Dr Kris Borg	Legal representative
Mr Joe Borg	Representative
Ms Jenny Cassar	Representative

Malta College of Arts, Science and Technology – Contracting Authority

Arch Deborah Borg	Chairperson Evaluation Board
Arch Karl Cutajar	Member Evaluation Board
Ing Damien Gatt	Member Evaluation Board
Dr Ing Alex Rizzo	Member Evaluation Board
Mr Emanuel Attard	Representative
Dr Peter Fenech	Legal Representative

After a brief introduction, the Chairman invited the appellant to give the reasons behind his objection.

Dr Stanley Portelli on behalf of the appellant company stated that the first consideration that should be given when adjudicating a tender is the price and the adherence to tender specifications. Thus when a bidder offers within the specifications and is the cheapest, he should be awarded the tender. Substance should prevail over form. The reason given for the rejection of appellant's offer was that a list of principal deliveries, for two of the past three years, was not submitted. Inspirations Limited did not operate during that period and thus could not give the requested list. This fact is acknowledged by the appellant. However Dr Portelli contends that on seeing that appellant's bid gave a list of deliveries for one year only, the evaluation board should have asked appellant for clarification for this omission. He admits that the law says that this clarification could not be sought. The spirit behind the clause is however, that such clarification could not be sought if the result gave the bidder an advantage over the other bidders. For example such clarification should not be used to change specifications. Such clarification would not have advantaged appellant firm because Inspirations would have explained that it formed part of a Group which contained Home-Mate and Atrium who certainly have the necessary experience. The contracting authority should ensure that the greater number of bids should be kept in consideration, for as long as possible to ensure value for money. Appellant's bid was in fact 25% cheaper than the awarded tender and Dr Portelli finds it difficult to explain why it was rejected. Tender asked for proof of three years' experience, thus excluding new bidders. However, he could not understand why the financial and economical stability of bidders was not demanded, and capability of executing the tender was not safeguarded.

Dr Peter Fenech on behalf of the contracting authority stated that unfortunately, regulations are there to be kept, because once a chink is opened, it becomes the subject to criticism and undue assertions. In this particular case however, appellant had a remedy in hand. The tender document itself contained a clause that allowed bidders to rely on the experience of other entities. Appellant only claimed to rely on such experience here during the hearing, but did not do so in the tender bid. There were no legal barriers for appellant to put down the experience of the other entities Inspirations forms part of, whereupon its bid would have been compliant. The evaluation board could not ask for clarification on this point because the tender document specifically stated that there could be no rectification of submitted information, and that clarification could only be obtained on information already submitted. What appellant company is claiming is not clarification but rectification, because appellant did not submit this information in the first place. As the appellant bid was not administratively compliant, the evaluation of its bid ended there, so his technical compliance was not evaluated.

Emanuel Attard on behalf of the contracting authority stated that additional information after the closing date of the tender is not admissible. In this case appellant did not submit a requisite and thus had a clarification been requested it would have been a rectification.

Dr Stanley Portelli once again insisted that the evaluation board could have asked for a clarification.

Dr Peter Fenech reiterated that it was an error appellant made when drawing up his offer that led to disqualification, because the solution was indicated in the tender document itself. Had the offer been properly drawn it would have included appellant's reliance on other firms for

experience, and this would have rendered the bid compliant.

Dr Kris Borg on behalf of the preferred bidder said that the law does not permit rectification. Appellant company was administratively non compliant because it failed to show in the tender bid its necessary experience. Appellant had all the facility to show other entities experience in the tender document but did not. Contends that his clients should not suffer because the appellant's failures.

The hearing was at this point brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 28th June 2013 and also through the verbal the Appellant's verbal submissions during the hearing held on the 6th August 2013, had objected to the decision taken by the pertinent Authority, in that:

- a) **The offer submitted by the Appellant was the cheapest, in fact by 25% of the Preferred Bidder's offer.**
- b) **The Product proposed by the Appellant is technically compliant.**
- c) **The Appellant acknowledges the fact that what was missing in the Appellant's bid was a 'List of principal deliveries for two of the past three years'. Appellant could only submit one year's delivery history since he was not operating during that period.**
- d) **The Evaluation Board of the Contracting Authority should have asked for clarifications regarding the missing data requested in the tender document submitted by the Appellant.**

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on the 6th August 2013 in that:

- a) **The Tender document contained a clear clause that allowed bidders to quote past performances of other connected entities.**
- b) **The Appellant could have availed himself of this 'Opportunity Clause'.**
- c) **No clarification was possible, as clarifications could only be requested by the Evaluation Board on information submitted in the tender document.**
- d) **To this effect, the Appellant's bid was not administratively compliant.**

Reached the following conclusions:

1. **The Appellant had the opportunity to utilise the clause which stated that' the bidders can also apply the past three year's performances of other connected entities'. In other words the Appellant could have stated past deliveries of either his suppliers of other connected companies such as subsidiaries or related companies.**
2. **Although this Board fully emphasises that clarifications should be sought during the evaluation stage as much as possible, in this particular instance, since the 'mandatory information' was missing, the Evaluation Board could not include 'additional information' after the closing date of tender.**

- 3. The 'onus' was on the Appellant to clarify or rather explain the reason for any missing information when submitting his tender document.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Richard A. Matrenza
Member

19th August 2013