

PUBLIC CONTRACTS REVIEW BOARD

Case No. 580

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 6 Staffroom workstation Module

On the 27th June 2013, Omni Stat filed an objection against the rejection of its bid as being administratively non compliant and the award of Lot 6 of the tender to FX Borg Furniture Ltd.

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:

Omni Stat – Appellant

Prof Ian Refalo	Legal Representative
Dr Mark Refalo	Legal Representative
Dr Mario Camilleri	
Mr Mark Schembri	
Ms Bernice Caruana	

FX Borg Furniture Limited – Recommended Bidder

Dr Kris Borg	Legal Representative
Mr Joe Borg	
Ms Jenny Cassar	

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
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 Mark Refalo on behalf of the appellants stated that first of all that the contracting authority confused selection criteria and award criteria. His clients were excluded because of their being administratively non compliant in the selection criteria. This was immediately after the opening of the tenders. This felt like an award criteria when in reality it was a selection criteria. He contended that there should be clear distinction between award criteria and selection criteria.

On being asked by the Board, Dr Peter Fenech for the contracting authority explained that since this was a one package tender, when it was found that Omni Stat's bid was non compliant, the evaluation process had to continue. Bidders were informed of the results at the end of the adjudication process. Thus it was only after the evaluation report was drawn up that appellants were informed that their bid was administratively non-compliant.

Dr Mark Refalo claimed that the criterion requiring a minimum of €200,000 deliveries per annum is not proportional. In this case there were several lots each with a different value. For Lot 1 the bids were around €400,000, and the criterion of €200,000 per year is acceptable. For Lot 6 however, where the bids ranged from around €60,000 to €140,000. The criterion, of deliveries of €200,000, was thus not proportional.

Dr Peter Fenech stated that appellant firm itself had filed a bid for €430,000 for one lot. The tender had to be issued as one call, divided into lots, to maximise benefits because of European funding. The figure for the required minimum deliveries was arrived at using the mean value of all the lots. In fact appellants themselves totally bid €961,000. This was a condition that was made known to all bidders before they submitted their bids, and if appellants wished to contest this, they could have had recourse to this Board before the closing date of the tender.

Dr Mark Refalo for the appellants stated that there was a general misunderstanding of what clause 6.1.2 requires. There are two distinct requirements, one is that "*has to provide a list of Principal deliveries effected during the last three years 2009,2010 and 2011*" while the other states "*the minimum value of deliveries of a similar nature completed shall not be less than €200,000 per annum*". Contended that bidders did not understand what was meant by these two requirements. His clients submitted works of 1.2 million euro for a period over six years that amounts to €200,000 per annum.

Chairman pointed out that the condition states €200,000 per annum and not an average.

Professor Ian Refalo for appellants interpreted the condition as an average condition because it is intended to ensure that whoever bids has the necessary competence. Thus it follows that if his clients delivered an amount of over one million over six years, they satisfied the condition. He contended that if an average of deliveries is not accepted, then the decision goes against the provisions of proportionality, citing the recent Court of Appeal decision regarding Ballut Blocks Ltd.

Dr Peter Fenech for contracting authority confirmed that appellants' bid was in fact the cheapest. The quoted court of appeal judgement stated that the best price amongst all those

that reach the requirements should be chosen. It was clear from the tender document that what was required was €200,000 per annum. An average of six years value is not acceptable and was not compliant. The contracting authority asked for three years 2009, 2010 and 2011. Omni Stat were found non-compliant because the information they submitted was not clear. In fact the evaluation board asked them for a clarification on the submitted information. Their reply however included additional information not submitted in the first instance, which is not acceptable. The information was still not clear in spite of the clarification. They were asked to give an average, but this average still did not reach the required threshold of €200,000. Their average came out to €148,000.

Dr Mark Refalo remarked that this figure of €148,000 is in fact greater than the bid submitted by the preferred bidder. This proves that the requirement was not proportional.

Prof. Ian Refalo claimed that the bench mark should have been based on separate lots and not on the whole tender.

Dr Peter Fenech reiterated that it was a funding requirement to issue one tender for the different lots.

The hearing was brought to a close at this stage.

This Board,

Having noted the Appellant's objection in terms of 'Reasoned Letter of Objection' dated 27th June 2013 and also through 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 Contracting Authority did not make a distinction between a 'Selection Criteria' and an 'Award Criteria'. In this regard a distinction had to be made by the Contracting Authority.**
- b) **The minimum mandatory 'Deliveries Clause' of Euros 200,000 per annum is not in conformity with a 'proportional criteria' procedure.**
- c) **There was a general misunderstanding of what clause 6.1.2 required in that:**
 - i. **The bidders had to provide a list of principal deliveries over the years 2009, 2010 and 2011.**
 - ii. **The Bidders had to prove that the minimum of deliveries shall not be less than Euros 200,000 per annum.**
- d) **The Appellant contested that this condition laid out in the tender document should be considered to mean as an average per annum.**
- e) **The Appellant referred to decision taken by the 'Court of Appeal' whereby it was decided that if the decision for the award of a tender goes against the principle of proportionality, this is not acceptable.**

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on the 6th August 2013, where in it was stated:

- a) That this tender was a 'One package' tender due to EU funding procedures. This condition was made known to all bidders.**
- b) That the Appellant's bid was not administratively compliant.**
- c) That the required minimum deliveries per annum were arrived at by applying a mean average value for all the lots.**

Reached the following conclusions:

- 1. From the Evaluation Board's report it is evidently clear that notwithstanding a request for clarifications, the Appellant failed to provide the requested data.**
- 2. In accordance with the Evaluation Board's report , the data supplied by the Appellant upon requesting clarifications, contained various negative variances**
- 3. The Tender document clearly stated the conditions and all Bidders were in duty bound to abide by the laid conditions in the document.**
- 4. The mandatory requirement of the 'principal delivery amount' over the last three years is to be construed as the amounts of deliveries in 2009, 2010 and 2011. The Euros 200,000 benchmark is to be considered as a fixed amount per annum and not an average per annum.**

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