

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 596**

**KCM/M 313/03**

**Tender for the Supply of Paving Material at Gnien il-Familja, Ta' Kerchem.**

The tender was published on the 25<sup>th</sup> January 2013. The closing date was the 22<sup>nd</sup> March 2013.

The estimated value of the Tender was €25,423.73 (Exclusive of VAT).

Two Bidders (2) bidder submitted an offer.

On the 19<sup>th</sup> July 2013, AF Ellis (Home Décor) Limited filed an objection against the rejection of their bid as being administratively non-compliant and the decision to award the tender to Rapa Showroom Co 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 24<sup>th</sup> September 2013 to discuss the appeal.

### **Present for the hearing:**

#### **A.F. Ellis (Home Decor) Limited**

Dr Joseph Ellis

#### **Appellant**

Legal representative

#### **Rapa Showroom Company Limited**

Mr Joe Paul Rapa  
Dr Joanne Vella Cuschieri

#### **Preferred Bidder**

Representative  
Legal representative

#### **Ta' Kerchem Local Council**

Mr Mario Azzopardi  
Ms Marianne Sagona  
Arch William Lewis  
Arch Alex Bigeni  
Dr Joshua Grech  
Dr Larry Formosa

#### **Contracting Authority**

Chairman Evaluation board  
Secretary Evaluation board  
Member Evaluation board  
Member Evaluation board  
Member Evaluation board  
Legal Representative

The Chairman made a brief introduction and asked the appellant's representative to make his submissions on the objection.

Dr Joseph Ellis, on behalf of the appellant company A.F. Ellis (Home Decor) Limited said that his client was disqualified because it failed to fill in Volume I, Section 2 of the Tender form subsection C, Clauses 1, 2, and 3, Tenderer's Declaration, and failed to give date and amount of tender. These items are found at page 18 of the tender document. Clause 1 states that bidder had examined the tender document including clarification notes, and that the bidder accepted the conditions in their entirety without reserve or restriction. He could not see what had to be filled in here. Clause 2 states that tenderer offers to execute, in accordance to the terms of the tender document and conditions, and time limits laid down, without reserve or restrictions, the following works. This was not filled in by appellant. Clause 3 deals with the price offer of the tender and was also omitted. Dr Ellis contends that these three clauses were through an oversight not filled in. He said that the notice sent by the contracting authority was not according to the regulations as it did not contain all the necessary details as required by Clause 34.3. It should have stated the preferred bidder, and the amount offered by the said bidder, but did not. He also stated that the notice was sent to appellant through the ordinary post and not as required by the Regulations that said that such notice had to be sent either by fax or by electronic mail. He cited the recent Court of Appeal in the case of Gatt Brothers vs the Victoria Local Council which dealt with the notice sent to bidders.

Dr Joseph Ellis stated that the information that was not submitted by appellant had been included in other sections of the appellant's tender bid. Page 51 Volume 4 of appellant's offer contained the necessary information, including the Bills of Quantities, rates the name of the tenderer and other relevant information. He said that the information omitted by appellant through an oversight in Volume I, Section 2 subsection C were in fact included in Volume 4. The appellants offer should not have thus been discarded, much more so as it was the most advantageous offer. He contended that the decision to disqualify appellant's offer was too harsh when considering also the fact that the evaluation board should have asked for a clarification from appellant in terms of Volume I Section 1 Article 29.1 of the tender document. Finally Dr Ellis pointed out that there was nowhere indicated in the tender document that failure to fill any of the Clauses 1, 2, and 3 of Section C Volume I would entail disqualification.

Dr Joshua Grech for the contracting authority said that the first grievance advanced by appellant company was frivolous as appellant had enough information enable it to file a letter of objection which in fact it did. Appellant admitted the omission of Clauses 1, 2, and 3 through an oversight, but this being an oversight does not mean the omission can be rectified. The fact that appellant failed to fill in these clauses went against the requirements of the tender documents. The tender form had to be filled and signed. Paragraph 16, note 3 states that no rectification shall be allowed, only clarifications on submitted information is allowed, and the evaluation board could not ask appellant to rectify its oversight. Furthermore Section C included also the tender declaration form where bidder had to declare that he accepted all the conditions of the tender document. Even this declaration was omitted by appellant. The evaluation board first examines the administratively compliance of bids, then the technical compliance and finally the financial aspect of the bids. Appellant's offer failed at the administrative stage and its technical and financial bid did not be examined. Therefore the evaluation board could not proceed to view Volume 4 of appellant's offer, to view the missing information, as is being claimed by the appellant.

Section C is the operative section of the tender. If appellant was awarded tender and difficulties arose later, the contracting authority would not be able to take necessary action against the appellant, because the tender declaration had not been signed. The decision of the evaluation board was not too harsh. After all there were other bidders who complied wholly with the tender documents and filled in all the forms. These should not be prejudiced by ignoring omissions. Replying to a question by the Board, Dr Grech confirmed that the preferred bidder's offer was the second cheapest, and the tender was fully compliant.

Dr Larry Formosa on behalf of the contracting authority explained that the evaluation board had sought direction on this matter from the Department of Contracts, but as a reply they were directed, by a letter of the 30<sup>th</sup> May 2013 to a recent decision by this Public Contract Review Board, whereby the omission of the signing of the Tender Declaration by a bidder was termed to mean non-compliance of the said bidder.

Dr Joanne Vella Cuschieri for the preferred bidder stated that the letter from the Contracting Authority had to state that a right of appeal was available and the time within which this was to be filed. In the present case, this procedure was adhered to by the contracting authority. The form consisted of three pages, but one of these pages was not filled. The missing information contained in this un-filled page was necessary for the validity of the offer. Article 16 clearly states that it 'must' be filled.

Dr Ellis for the appellant said that this was not a three package tender and all the volumes had to be available to the evaluation board.

Dr Joshua Grech for the contracting authority explained that evaluation board had to follow procedures. Appellant's bid failed at step 2 and could not be evaluated for the next steps. The single envelope procedure required six criteria or steps that had to be evaluated. The bid bond that was not required, proof of purchase, conditions of employment, financial standing, experience as contractor the technical offer and the financial offer, bills of quantity. Dr Grech reiterated that this was covered by note 3 that allowed no rectification. As soon as the offer was non-compliant, the remaining steps would not be evaluated, so the evaluation board did not go into appellant's financial offer. Appellant's bid was defective while the other tender had done everything required.

Dr Joseph Ellis closed by stating that the evaluation board should have asked the advice of the General Contracts Committee and not of the Director of Contracts.

The hearing was here brought to a close.

**This Board,**

**Having noted the Appellant's objection in terms of the ' Reasoned Letter of Objection' dated 18<sup>th</sup> July 2013 and also through the Appellant's verbal submissions presented by same during the hearing held on 24<sup>th</sup> September 2013, had objected to the decision taken by the pertinent Authority, in that:**

- a) **The Appellant refers to the letter dated 8th July 2013, sent to the Appellant by the Contracting Authority, whereby:**

- i) In the tender document, referring to clause 34.2 of Volume 1, there was no indication of the requisites that the Contracting Authority are insisting, the Appellant failed to submit.**
  - ii) The Contracting Authority failed to abide by clause 34.3 wherein, it is requested that the communication is to be remitted to the Appellant by electronic mail.**
- b) The decision taken by the Evaluation Board to eliminate the Appellant's bid on the grounds that the latter failed to include details in the appropriate form of the tender document, was too harsh.**
- c) The information requested in the tender document was in fact submitted but due to oversight it was not listed in the appropriate section in the tender.**
- d) The Evaluation Board should have asked the Appellant for clarifications since Appellant's bid was the cheapest.**

**Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 24<sup>th</sup> September 2013, in that:**

- a) The Appellant admitted the omissions and failed to fill in details which were mandatory.**
- b) The tender document states that no retifications will be allowed and in this respect the Evaluation Board had to abide by these regulations. To this effect, the Appellant's bid failed the 'Administrative Compliance' test and the offer could not be evaluated further.**
- c) Other bidders complied in all respect with regards to detail and information requested in the tender document.**

**Reached the following conclusions:**

- 1. The tender document is the formal contract between the Contracting Authority and the tenderer. The same document, like any other contract, imposes the duty and obligation on the tenderer to abide strictly by the conditions laid out in the tender document.**
- 2. The Appellant failed to give the complete information as stipulated in the tender document.**
- 3. The Evaluation Board could only request for clarifications on information submitted and contained in the tender document. The same Board cannot ask for clarifications on information missing from the tender document.**

- 4. Although the Appellant's Bid would have been the cheapest, it was the Appellant's onus and duty to check and verify that the tender document was fully complete prior to submission of same to the Contracting Authority.**

**In view of the above, this Board finds against the Appellant Company, however, this same Board recommends that the deposit paid by the Appellant be reimbursed.**

Dr. Anthony Cassar  
Chairman

Dr. Charles Cassar  
Member

Mr. Richard A. Matrenza  
Member

*31 October 2013*