

PUBLIC CONTRACTS REVIEW BOARD

Case No. 601

CT 2170/12

Tender for the Finishing of Ten (10) Apartments at 56 Argotti Street, Floriana.

The tender was published on the 9th November 2012. The closing date was the 20th December 2012.

The estimated value of the Tender was: €160,941.60 (Inclusive of VAT).

Nine (9) bidders had submitted offers for this tender.

On the 24th May 2013 KDF Limited filed an objection against the decision to discard its offer as being technically non-compliant.

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 1st October 2013 to discuss the appeal.

Present for the hearing:

KDF Limited - Appellant

Mr Karl De Flavia	Representative
Dr Adrian Delia	Legal Representative
Dr Matthew Paris	Legal Representative

CP Projects Joint Venture - Recommended Bidder

Mr Dmitry Pechenkin	Representative
Ms Veronica Zammit	Representative
Dr Mark Refalo	Legal Representative

Housing Authority - Contracting Authority

Perit Andre Pizzuto	Chairman Evaluation Board
Ms Graziella Calleja	Secretary Evaluation Board
Perit Anthony Camilleri	Member Evaluation Board
Perit Felix Sciberras	Member Evaluation Board
Perit Melanie Spiteri	Member Evaluation Board
Ms Romina Fenech	Representative

Department of Contracts

Mr Nicholas Aquilina	Procurement Manager
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Following a brief introduction by the Chairman, the appellant's representative was invited to put forward his submissions on the objection.

Dr Adrian Delia on behalf of the appellant KDF Ltd stated that his client was given three grounds for the disqualification of its offer. He reminded the Board that this was a 'Price Only' tender, where his client had the cheapest offer.

The first reason for disqualification was "**Volume 1 Section 2 – Tender form: VAT Number not submitted.**" He claimed that this was strange, as his client not only had not failed to submit this number, but had enclosed an authenticated copy of the VAT certificate with the tender bid.

The second reason given for disqualification was "**Form 7 – Personnel to be employed on this contract: Form incomplete. Names of H&S Representative and First Aider requested were not submitted.**" Again, this is not understood because appellant had enclosed CVs and certificates for the two persons therein indicated and shown by their names. That is H&S Representative and First Aider, respectively Victor Vella and Karl de Flavia are named and their Ids, Addresses, Telephone numbers, mobile phone numbers and certificates were enclosed with the tender.

The third reason for disqualification was "**Form 9 – Work plan and Programme of Works: Work plan was not signed.**" Dr Delia stated that his clients filled in correctly a detailed tender form and was disqualified by the evaluation board for omitting to sign just one form. He queried under which European Union decisions, and under which section of the local Public Procurement Laws is it stated that if a bidder, who was easily identified, has this particular signature been made mandatory, to disqualify him if he omits to sign?. This was not for example, a guarantee, which it is normally accepted, that has to be formally signed. The contracting authority is saying that the work plan was not signed.

Dr Delia continued by agreeing in part with the reasoned letter of reply filed by the recommended bidder, that no rectification should be allowed. Here, Dr Delia continued is not a case for rectification since his client had submitted the items in question in the original offer. If anything, appellant had increased formality, where a VAT number was requested, appellant submitted a VAT certificate. Regarding the other submissions made in the letter of reply, Dr Delia stated that these are true in fact and at law, but are not applicable for the present case. Where certain documents are requested in the tender, where it is clear that these form a formal and substantive part, then formality is applicable. If on the other hand the evaluators are trying to find fault through formalities, when it is evident that the information is already submitted, both local and overseas jurisprudence says that not only substance has to override form, but a clear and transparent effort should be made by the contracting authority to remove any doubts, opening up the evaluation procedures to as many bidders as possible, on condition that this is not prejudicial to third party interests.

The Chairman, Public Contracts Review Board asked the contracting authority if the information mentioned by the appellant above was in fact included in the tender document.

Perit Andre Pizzuto on behalf of the contracting authority stated that the tender document should be filled in its entirety. The VAT number in the tender form was missing. The evaluation board goes through tenders and sees that what was requested was given. A VAT certificate was not requested. The tender asked for completed forms. Additional enclosures were not assessed.

The Chairman remarked that if a bidder submitted a certificate which contains the VAT number and which is signed by the VAT commissioner, could it be said that the bidder did not submit the information?

Perit Andre Pizzuto affirmed that bidders' obligation, according to Clause 16.1 to provide the duly completed documents. Among these is the tender form. This was not duly completed by appellant. The tender form is a critical form and cannot be rectified. There were other bidders who were disqualified for omissions.

The Chairman here remarked that the form had the VAT number missing.

Perit Andre Pizzuto reiterated several times that the form was not duly completed. He could not state if the certificate was enclosed or not.

Mr Karl de Flavia, Director of the appellant company said under oath that the VAT certificate was submitted with the tender document. It was included in another separate folder attached to the tender. This folder was inserted with the tender in the envelope.

The Chairman wanted to ascertain that the certificate was enclosed with the tender, but this could not be found.

Perit Andre Pizzuto continued that if anything in the tender form had something missing, then it cannot be rectified, and if it cannot be rectified then it means that the tender bid is administratively non compliant. Since the form was not duly completed, at this stage no consideration was given to the financial offer and so he could not say if the appellant's offer was the cheapest or not. Page 21 of the appellant's bid was not filled-in with the VAT number. The second submission made by appellant regarded form 7. This form had to be filled. Page 30 of the tender, required a list of names, nationality experience and so on of employees. In appellant's bid this was not completed. The CVs mentioned by Dr Delia were not found in the tender, either. The evaluation board were not present when the tenders were opened as this was done by the contracts department. The offers were later given to the evaluation board. Mr Pizzuto himself was not an evaluator. In spite of the declaration that "see enclosed document" there were no other documents in the box of documents handed to the evaluation board by the Department of Contracts.

The Board asked the Chairman, Evaluation Board, Perit Andre Pizzuto if he as Chairman, had done any investigation regarding the fact that there was written "see enclosed documents" on the forms in question.

Perit Andre Pizzuto replied that when handed over the offers, the evaluation board were given to understand that they were given all the documents submitted by the bidders. No documents were missed by the evaluation board. It was ensured that the box containing the bids were empty. If it results that the department of contracts failed to provide the evaluation board with all the documents, then the evaluation has to be made again. Perit Andre Pizzuto continued that however, the signing of the work plan was demanded from all bidders. Bidders had to endorse their plans by signing the declaration, which specifically stated that failure to do so would result in the bid being discarded. By signing this, bidders accepted the tender conditions.

Dr Adrian Delia for the appellant stated that when a bidder signs the tender form it means that

he is accepting all the conditions of the tender, even if a clarification is subsequently issued, he is accepting that as well. He continued to state that if it is confirmed that the required information is not there, then the appeal would be withdrawn. He contended that the information was submitted, as otherwise appellant would not have objected.

Dr Mark Refalo on behalf of the preferred bidder said that according to Regulation 84, paragraph 4, the objection shall only be valid if accompanied by a deposit of .75% of the value of the tender, but this shall not be less than €1,200.00. Appellant's deposit with the letter of objection was €1,023 and therefore the objection was not valid. Appellant may have been misinformed of the amount by the Department of Contracts but the law allows no discretion on this point of the deposit. The appellant should also not have expected the evaluation committee to examine documents submitted in lieu of the proper forms. He also referred to the CV filed by appellant with the letter of objection and remarked that it did not show the number of years experience as requested by Form 7. Neither did the appellant fill in the value of the projects delivered.

At this point the hearing was brought to a close, and adjourned to the 3rd October 2013 for the opening of the copy of the tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members re-convened a hearing on Thursday 3rd October 2013 to view the copy of the tender.

Present for the hearing:

KDF Limited - Appellant

Mr Karl De Flavia
Dr Adrian Delia

Representative
Legal Representative

CP Projects Joint Venture

No one was present

Recommended Bidder

Housing Authority

Perit Andre Pizzuto
Ms Graziella Calleja
Perit Anthony Camilleri
Perit Felix Sciberras
Perit Melanie Spiteri

Contracting Authority

Chairman Evaluation Board
Secretary Evaluation Board
Member Evaluation Board
Member Evaluation Board
Member Evaluation Board

Department of Contracts

Mr Nicholas Aquilina

Procurement Manager

The Chairman explained that this second hearing was reconvened so that the extra copy of the tender that was submitted with the tender be opened and examined to see if the missing documents were contained in the copy.

Mr Nicholas Aquilina, procurement manager, Department of Contracts opened the sealed box containing the copies of the tenders submitted, and shown the Chairman the copy of appellant's tender.

The VAT certificate was found. The Memorandum and Articles document was found. Technical capacity and reference letters from Floriana Local Council, Qormi Local Council, Zabbar Local Council and Sta Lucia Local Council. The CVs of Victor Vella and Karl De Flavia were also found in the copies. All the document copies were loose leaf however and were not bound into a folder. Mr De Flavia was the First Aider and Mr Vella was the Health and Safety Officer.

The Chairman pointed out that all the documents were found in the copy of the tender.

Perit Andre Pizzuto on behalf of the contracting authority stated that appellant's technical bid had not been assessed because his bid had been deemed administratively non-compliant. He referred to Clause 30 of the Instructions to Tender explained the procedure to be used when adjudication. Evaluation will check the compliance of tenders with the instructions given in particular any documentation submitted under clause 16. This clause states that bidders have to present "duly completed" documents. The evaluation board shall also request rectifications in respect of incomplete or non submitted information under Clause 16.1 a, b and c. Items d) Technical capacity; e) Evaluation criteria/Technical specifications; and f) Tender Form/Bill of Quantities fall under note 3 and under this note no rectification shall be allowed, only clarifications on submitted information may be requested. Thus appellant's work plan was not signed and this cannot be rectified. The tender form was not completed and thus cannot be rectified. Form 7 is incomplete and also cannot be rectified.

Appellant's bid had the following defects. The VAT number on the tender form was not submitted therefore the tender was not administratively compliant. In Form 7 the names of the employees and their nationality were not submitted and therefore incomplete. The CVs shown in the copy of the tender was not available to the evaluation committee.

Perit Melanie Spiteri a member of the evaluation board stated that if this is accepted it would create a precedent.

Perit Andre Pizzuto stated that Form 9 was not signed.

Dr Delia rebutted that Form 9 was part of the tender document and the tender form was signed and accepted by the appellant. The tender declaration when signed by the bidders is binding on the bidders. Form 9 is just a Gantt chart.

Perit Felix Sciberras, member of the evaluation board stated that the evaluation board followed procedure, and did not do anything wrong.

Perit Anthony Camilleri, another member of the evaluation board said that when the department of contracts compiled the formulation of the tender it had a reason for designing the forms. If these formats were not used by the bidders, then evaluators would find it

difficult of comparing like with like.

Mr Nicholas Aquilina, on behalf of the Department of Contracts, stated that he feels that the Department is being criticised and made a scapegoat. According to law once the threshold of €120,000 is passed, the Department of Contracts acts on behalf of the contracting authority and that is why the opening of the tenders is done at the department. When it comes to evaluation, this is the sole responsibility of the evaluation board. When the evaluation board submits the report this is then vetted by the department.

The Chairman explained that the whole question arose because apparently, the folder enclosed with the appellant's bid, containing documents, was not forwarded to the evaluation board.

The hearing was at this point brought to an end.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 24th May 2013 and also through the Appellant's verbal submissions presented by same during the hearing held on 1st October 2013, had objected to the decision taken by the Pertinent Authority, in that:

- a) The Appellant's bid was regarded as 'Administratively non Compliant', due to the fact that the VAT number was missing. In actual fact, the Appellant did submit the required information by way of a copy of the VAT certificate.**
- b) The Evaluation Board claimed that the Appellant did not submit the information as stipulated in Form 7 of the tender document. The Appellant contends that all the information was in fact submitted by an addendum to the tender document.**
- c) The Evaluation Board considered that Form 9 incorporated in the tender document was incomplete due to the Appellant's missing signature.**
- d) Appellant claims that this Form 9 did not represent any type of guarantee, so that a missing signature on a particular form in the tender document does not render the Appellant's bid as 'Administrative non Compliant'.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 1st October 2013, in that:

- a) The Evaluation Board confirmed that Forms 7 and 9 of the Appellant's Bid were incomplete.**
- b) That the Evaluation Board assessed the bids on information/documentation passed on by the Contracting Authority.**

- c) **The Evaluation Board insisted that the separate documentation which the Appellant claimed to have been submitted were not available during the evaluation process.**
- d) **The Evaluation Board stated that the evaluation procedure adopted was in accordance with the current regulations.**

Reached the following conclusions:

- 1. First of all this Board considers that the fact that there were other bidders who were disqualified for omissions does not in any logical way have a bearing on this appeal. During the second hearing held on 3rd October 2013, it was evidently proved that the Appellant did submit the required information, but as an addendum to the tender document. So that there was no omissions on the Appellant's part.**
- 2. During the second hearing, this Board also noted and exhibited to all parties concerned that the information submitted by the Appellant in the form of an addendum were actually included with all the documentation of the tenders. In this regard, this Board considers the Appellant's bid to be 'Administratively compliant'.**
- 3. The fact that, the documentation submitted by the Appellant through an addendum, was not passed on to the Evaluation Board should not penalise the Appellant's bid and same be considered as not' administratively compliant'.**
- 4. This Board considers that, after having carried out the necessary verification, the submitted documentation by way of an addendum, same contained the necessary information as that required in the forms of the tender document.**
- 5. This Board also noted that the Appellant's Bid was the cheapest.**

In view of the above, this Board finds in favour of the Appellant Company and recommends:

- i) That the deposit paid by the Appellant be reimbursed.**
- ii) That the Appellant's Bid be integrated in the next stage of the evaluation process.**

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Richard A. Matrenza
Member

12 November 2013