

PUBLIC CONTRACTS REVIEW BOARD

Case No. 611

WSC/323/11

Tender for the Supply of Microsoft Office Licences.

The tender was published on the 19th October 2012. The closing date was the 12th November 2012.

The estimated value of the Tender was: €59,322 (Exclusive of VAT).

Seven (7) bids were received for this tender.

On the 29th August 2013 eWorld Limited filed an objection against the decision to discard its offer and to award the tender to Computer Solutions 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 Thursday 10th October 2013 to discuss the appeal.

Present for the hearing:

eWorld Limited - Appellant

Mr Wayne Hewitt	Representative
Mr Raphael Micallef Trigona	Representative

Computer Solutions Limited - Preferred Bidder

Mr Edward Cauchi	Representative
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Water Services Corporation - Contracting Authority

Engineer Antoine Psaila	Chairman Evaluation Board
Mr Jonathan Scerri	Secretary Evaluation Board
Mr Alex Attard	Member Evaluation Board
Mr Anthony Camilleri	Representative
Engineer Mark Perez	Representative

Following a brief introduction by the Chairman, the appellant's representative was invited to make his submissions on the objection.

Mr Raphael Micallef Trigona on behalf of the appellant said that its bid was discarded because in Option 1, Office 2010 was offered whilst tender requested Office 2013, and that Option 2 was not the lowest offer. Regarding Option 1, Mr Micallef Trigona explained that since the tender was asking for Open Licences, this meant that whoever sold such licence was bound to supply always the latest version of Office, in this case the 2013 version, and this is attested by Microsoft themselves in an email that Mr Micallef Trigona produced. The tender was published in October 2012 and there was a clarification issued in the first week of November, while the closing date was the 12th November 2012. He explained that the original tender asked for Office 2010. He claimed that Microsoft Office 2013 was not yet available commercially at the closing date of the tender, as it only was commercially available on the 1st December 2013. Appellant did not ask for clarification on this point because as the tender request was for Open Licence Product, the onus of understanding how an OLP worked was with the contracting authority. He further explained that when an Open Licence is sold, the seller is not permitted to provide older versions of the software, but has always to provide the latest version. As Office 2013 was going to be issued on the 1st December 2013 the fact that appellant offered Office 2010 meant that de facto, appellant was offering Office 2013.

Mr Raphael Micallef Trigona continued that in July 2013, appellant was asked to extend the validity of the bid bond up to 15th September 2013 as the adjudication process was in the final stages. He contended that this bound appellant to supply the requested Office 2013 at the same price he submitted with his tender. His offer for Option 1 was the cheapest.

Mr Antoine Psaila on behalf of the contracting authority said that during the evaluation process, it was seen that appellant eWorld had submitted two Options. In its option 1, in the financial bid, it is clear that what is being offered is Office 2010. Option 2 was also originally offering Office 2010 but enclosed with the offer was a declaration that since in December 2012, a new version of Office 2013 was being issued, therefore appellant would be offering this latest version of the software. This offer for option 2 was acceptable but was not the cheapest offer. However, notwithstanding that through a clarification the contracting authority had asked for Office 2013, appellant did not state that eWorld would be supplying the new 2013 version of the software, and left its offer for Office 2010. Other bidders had complied. It was only following the July 2013 letter asking for the renewal of the validity of the bid bond, that appellant sent an email offering Office 2013 and a reduction in the price offer. Thus appellant was changing both the product and the price of the original offer. The evaluation board followed the procurement regulations.

Mr Raphael Micallef Trigona said that the price reduction offer was not the reason for appellant's disqualification. The objection is that by the request of Office Open Licence, bidders were bound to supply always the latest version of the software. The contracting authority specifically asked for Microsoft Office Open Licence. Thus appellant's option 1 meant that if the tender was awarded after the 1st December 2012, then appellant would have had to provide the 2013 version. Replying to a question by the Chairman, Mr Micallef Trigona confirmed that appellant had offered to reduce the bid for option 1, but no reply from the contracting authority was received.

Mr Wayne Hewitt on behalf of the appellant stated that in July 2013 appellant was asked to re-confirm its bid and renew the bid bond. Since this was an Open Licence appellant stated

that the latest 2013 version would be supplied. The contracting authority never asked appellant to explain how Open Licence works and it was assumed that the contracting authority was aware. Open Licence means that a seller cannot sell an older version of the software, but must always supply the latest version.

Mr Alex Attard, a member of the evaluation board confirmed that an open licence meant that the newest version be supplied, but stated that on the 5th November 2012, a clarification was issued asking that bidders change the product code of the their bids to show that the product offered was Office 2013 and not Office 2010. All the other bidders complied with this but the appellant did not. Appellant's bid for option 1 was administratively compliant but was not technically compliant because of the version of software offered.

Mr Mark Perez, procurement officer at the Water Services Corporation stated that the corporation was obliged to obtain the cheapest offers but always according to the regulations of Public Procurement. He explained that his first reaction was to accept this offer. But if this was done the contracting authority would be going against the Regulations. A tender bid to be valid had to be made on the Financial Schedule of the tender. Appellant's bid was not submitted on the financial schedule of the tender. The original financial schedule was amended. Appellant's bid was made on the superseded financial schedule and this meant that the offer was not administratively compliant. Appellant's offer was the cheapest but was not administratively compliant.

Mr Alex Attard finally said that from research with Microsoft, revealed that Office 2013 would be launched in the first quarter of the year. But customers purchasing Office after the 19th October 2012 from the local retailers would receive the new Office for free according to availability. Thus appellant should have done as all the other bidders, and submitted its offer for Office 2013. He stressed that this automatic upgrade would only be available if purchased after 19 October 2013.

Mr Wayne Hewitt stressed that appellant was bound to sell the latest version.

Mr Mark Perez asked the reason why appellant's option 2 offered Office 2013 while Option 1 offered Office 2010 if it was bound to sell only the latest version?

At this point the hearing was brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 29th August 2013 and also through the Appellant's verbal submissions during the hearing held on 10th October 2013, had objected to the decision taken by the pertinent Authority , in that:

- a) The Appellant insisted that since the tender was for an 'Open Licence', the tenderer must always supply the latest version of the software.**

- b) The reason why the Appellant quoted version 2010 was due to the fact that the latest version, ie. version 2013, would be available on the market after the closing date of the tender.**
- c) It is a known fact that an ‘Open Licence’ must include the latest version of software and in this regard the Evaluation Board should have known this.**
- d) On the other hand, the Appellant was not aware that the Evaluation Board was not knowledgeable on this matter. In this regard, the Evaluation Board should have asked for clarifications from Appellant who would have gladly complied.**

Having considered the Contracting Authority’s verbal submissions during the hearing held on 10th October 2013, in that:

- a) The Appellant did not declare that he would be supplying the latest version of software but quoted version 2010 in his offer. Other bidders did conform to this requirement.**
- b) Through an E mail sent by the Appellant, the latter altered the bid price by way of a reduction in price quoted originally in the tender document.**
- c) The Evaluation Board followed the correct procedures in accordance with the regulations of the Public Procurement.**
- d) The Evaluation Board did confirm that an ‘Open Licence’ required that the latest version of the software had to be supplied.**

Reached the following conclusions:

- 1. It is the Appellant’s obligation to seek clarifications from the Contracting Authority, if in doubt, and not vice versa. However, this Board opines that such present rigid regulations relating to Public Procurement ought to be amended to allow more space for the Evaluation Board to use its discretion in clarifying certain details in the tender bids without having to justify whether it is a clarification or a rectification of specific details.**
- 2. From the submissions made by both the Appellant and the Contracting Authority, this Board establishes the fact that an ‘Open Licence’ automatically necessitates the most recent software.**
- 3. The Evaluation Board of the Contracting Authority could not entertain the fact that an adjusted reduced bid price be submitted as this would lead to a rectification to the submitted original bid.**

- 4. This Board strongly feel, that prior to submission of the tender document, the Bidder, for his own benefit and advantage, is in duty bound to abide by all the conditions stipulated in the tender document. The Bidder is also advised to give any additional information which is deemed necessary to avoid any misunderstanding.**

Important to avoid unnecessary implications/misunderstandings which will eventually hinder the Evaluation process and which in fact result to the detriment of the bidder.

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

13 November 2013