

PUBLIC CONTRACTS REVIEW BOARD

Case No. 632

CT 2193/2012

Tender for the Supply of Ankle Boots to the Malta Police Department.

The tender was published on the 18th January 2013. The closing date was the 28th February 2013.

The estimated value of the Tender was €250,000 (Inclusive of VAT).

Thirteen (13) bidders had submitted an offer.

On the 2nd September 2013, JBC Clothing Mfg & Imp filed an objection against the decision taken to disqualify its offer.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday 12th November 2013 to discuss the appeal.

Present for the hearing were:

JBC Clothing Mfg & Import - Appellant

Mr Walter Balzan	Representative
Mr Joseph Busuttil	Representative
Ms Aimee Cassar	Representative
Dr Kristian Balzan	Legal Representative

Phoenix Group Limited - Preferred Bidder

Ms Anne Petroni	Representative
Mr Stephen Petroni	Representative
Dr Adrian Delia	Legal Representative

Malta Police Department - Contracting Authority

Inspector Kenneth Haber	Member Evaluation Board
PC Andy Bellia	Member Evaluation Board
Mr Martin Debono	Member Evaluation Board

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

Dr Kristian Balzan on behalf of the appellant said that the basis of this objection mainly was the interpretation given to "preferably" and "necessary". The tender document did not exclude other options but instead stated that other options would be considered. He stated that Legal Notice 312 of the 2012 Regulation 28.3.b, which refers to the lowest priced offers that conform to the tender specifications, was transposed to Directive 2004/18 EC. Article 53 of this directive states that 'reference is made to the lowest price only.' Dr Balzan claims that when transposing the directive to the Legal Notice, this was not done, and therefore contends that when in doubt, the Directive should always be followed. This directive states "the lowest price" only and does not qualify this in any way. He continued that his client was disqualified because of the third speed loop. He continued that a loop is a loop under any definition found in all dictionaries. However the contracting authority interpreted this otherwise, and defined the third speed loop incorrectly.

Mr Joseph Busuttill, the owner of appellant company, on behalf of appellant stated that the appellant's offer was discarded because the third loop or speed loop is in fact a speed loop. He explained that there were speed hooks and speed loops and these allowed for the rapid untying of the bootlaces. Normal shoes have eyelets that do not allow rapid removal. Speed loops are frictionless and allow rapid removal. The difference between speed loop and speed hook is that the hook loop is open and speed loop is closed, but both allow for the rapid untying of the laces. The third loop of the boots offered by the appellant is a loop. Appellant's offer was disqualified because the third loop from the top is a loop.

Dr Kristian Balzan on behalf of the appellant pointed out that the recommended bidder's offer is €30,000 more than the appellant's offer, that is, substantially dearer. This was a lowest price tender and not a most economically advantageous offer tender. Dr Balzan referred to the book EU Public Procurement Law by Christopher H Bones that states at page 286 "with respect to the lowest price notes that when this is selected as the award criterion, contracting authorities must not refer to any other qualitative considerations when deliberating the award. The lowest price is the sole quantitative benchmark that differentiates the offers. However contracting authorities can reject a tender if they regard the price as abnormally low." Therefore the notice received by appellant stating that the tender was to be awarded to the cheapest price tender satisfying the administrative and technical criteria, was not correct. This was because the EU directive mentions only the lowest price and therefore appellant's bid should have been awarded since it was the cheapest. The word "preferably" should not override the lowest price. Article 6 of the tender technical specifications states that "at the upper part of the boot there should be preferably less than three pairs of speed loops. Other options would be considered." Therefore the specifications allowed other options. The key word is "would" and not "may". He contended that thus other options should have been considered at a par. The specifications do not state what type of speed loop was requested. The boot submitted by appellant has two speed lace hooks and one speed lace loop.

Mr Joseph Busuttill for the appellant explained that the boots offered by appellant contained two speed hooks and one speed loop. It was because of this last speed loop that the appellant's offer was discarded.

Dr Kristian Balzan continued that the lacing system requested by the tender was "preferably" and therefore was not compulsory. Submitting other options should not lead to

disqualification. He asked if the decision to choose an offer €30,000 dearer was justified, taking into consideration that difference was based on the interpretation of what is considered a loop, and when the tender allowed other options? He contended that other advanced countries used the same lacing system submitted by the appellant. Finally Dr Balzan expressed doubts about the reliance on the MCCA by the evaluation board. This MCCA, in Dr Balzan's opinion abused its discretion and prejudiced the award. The tender was after all being awarded to a bidder offering €30,000 dearer offer just because of the interpretation of the word 'loop'.

Inspector Kenneth Haber on behalf of the contracting authority stated that the tender required "speed loops" and the use of the word preferably did not refer to these. The tender was configured thus because this was the third time this tender was issued and the contracting authority would accept these types of loops even if there were four or two of them, but they had to be speed loops. Inspector Haber showed the board two boots, one submitted by the appellant and the other one by the preferred bidder. It can be easily seen that speed loops are open. Appellant submitted two speed loops. These speed loops were required to facilitate the ease of removal of the boots and not the donning of the boots. It was required that the boots could be rapidly removed. Whenever tenders are being evaluated, the contracting authority always refers samples to the MCCA for testing. It was this MCCA that stated that the test result showed that in appellant's case it was not a speed loop. He showed the Board the test result from the MCCA that said that appellant's boots "*having 4 pairs of eyelets, 1 steel loop and another 2 pairs of speed loops.*" The contracting authority wanted at least three pairs of speed loops.

P.C Andy Bellia on behalf of the contracting authority explained that the specifications are suggested by the laboratory. Any bidder who had any doubts regarding specifications of the loops, whether these were open, speed etc they could have asked for clarification before submitting the tender. The present tender requested two types of loops, eyelets and speed loops. Three speed loops and four eyelets. Appellant submitted 2 speed loops, a steel loop and 4 eyelets, and the sample was not tested by the evaluation board since it was tested by the MCCA laboratory. In fact appellant's offer had not been evaluated yet since the laboratory test failed, and the evaluation of the offer was stopped. Preferably referred to the number of speed loops required and not to the number. Appellant submitted closed speed loops.

Dr Adrian Delia on behalf of the preferred bidder claimed that it was not for the Public Contract Review Board to decide on the technical specifications. The Public Procurement is governed as follows: 1. By the law; 2. The tender document; 3. Jurisprudence of this Board and the Courts of Justice and 4. Foreign authors; but only if the previous three were not clear. The PCRB has to conform to the terms of the law, which does not state that when the tender is price only, the price is the sole criterion. The price factor is considered after the bid has been deemed to be technically compliant. Technical compliancy cannot be decided by the Board. Technical compliance according to law can only be decided by the evaluation board. His client, the preferred bidder, could have offered cheaper boots if the specifications allowed it, but instead followed the specifications. These specifications can only be changed through clarifications. If anything the specifications were not clear enough. In fact the preferred bidder did not submit an off the shelf product but had the boots specially made.

Mr Martin Debono, a member of the evaluation board, on behalf of the contracting authority said that the tender document made no mention of speed hooks. What the tender document required were speed loops. The evaluation board relied on the test result from the MCCA.

This differentiated between speed loops and speed hooks. The laboratory result stated that appellant's offer had 2 speed loops and a 1 steel loop, and I interpret that as not being what was requested.

Dr Kristian Balzan on behalf of the appellant reiterated that his client's bid was rejected because of the third loop. He insisted that this in fact was a speed loop and therefore satisfied the specifications.

P.C Andy Bellia asked why appellant submitted two speed hooks and a speed loop when the tender requested three speed loops.

Ms Anne Petroni on behalf of the preferred bidder said there was no official definition of speed loop. It is important however that these are considered as such by the user. In the present case, the MCCA deemed it not according to specifications.

Dr Kristian Balzan exhibited a document that showed how the question of steel loops was interpreted in other countries.

Dr Adrian Delia finally reiterated that the evaluation of technical capacities should only be decided upon by the evaluation board. The PCRБ can make any comments but cannot decide the technical compliancy. The specifications cannot be changed.

Mr Stephen Petroni for the preferred bidder stated that the tender specifications were followed by the appellant one hundred percent. The specifications were examined by the preferred bidder, by its advisors and by its suppliers. All agreed that three identical pairs of speed loops had to be submitted. The Board cannot at this point decide otherwise as this would change the tender specifications.

Replying to a question by the Board, Inspector Haber said that the tender had been issued four times before because all the bidders had been either administratively or technically non-compliant.

The hearing was closed at this point.

This Board,

Having noted the Appellant's objection in terms of the 'Reasoned Letter of Objection' dated 30th August 2013 and also through the Appellant's verbal submissions during the hearing held on 12th November 2013, had objected to the decision taken by the pertinent Authority, in that:

- a) The Appellant contends that his offer was discarded due to minor technical details which in actual fact are debateable.**
- b) The Appellant's bid price was Euros 30,000 cheaper than that of the Preferred Bidder.**

- c) **The product offered by the Appellant has the same effective function as that offered by the Preferred Bidder.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 12th November 2013, in that:

- a) **Prior to issuing the tender, for the third time, the Contracting Authority sought expert and technical advice as to the specific function of the product so that the technical specifications would be drawn up in the tender document in the most explicit description.**
- b) **The product offered by all Bidders were tested at the National Laboratory and the Appellant's product failed the test.**

Reached the following conclusions:

- 1. This Board notes with regret that after unnecessary, lengthy, if not repetitive submissions by both the Appellant and the Contracting Authority, this tender in particular has been engulfed in a pitiful state of stagnation. In this regard, this Board opines that the decision taken by same will end this saga once and for all.**
- 2. Any Board of Appeal has to rely on technical experts in the field, in so far as technical matters are concerned. This Board is satisfied that enough technical expertise was sought by the Contracting Authority to ensure a just and transparent evaluation of the submissions. In doing so, it was found that the Appellant's bid was 'technically non compliant'.**

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

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancillieri
Member

4 February 2014