

PUBLIC CONTRACTS REVIEW BOARD

Case No. 694

KLM 2013/10

Tender for the Supply and Installation of Equipment of Leisure Park in Rural San Tumas.

The tender was published on the 10th December 2013. The closing date was the 31st January 2014.

The estimated value of the Tender was €118,903.71 (Inclusive of VAT).

Five (5) bids had been received for this tender.

On the 2nd April 2014 Projekte Global Limited filed an objection against the rejection of its bid.

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 the 6th May 2014 to discuss the objection.

Present for the hearing were:

Projekte Global Limited - Appellant

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| Mr Desmond Mizzi | Director |
| Dr Matthew Paris | Legal Representative |

JGC Limited - Preferred Bidder

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| Mr Pierre Cuschieri | Representative |
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Kunsill Lokali Marsaskala - Contracting Authority

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| Mr Josef Grech | Executive Secretary |
| Perit Aaron Abela | Member Evaluation Board (Technical) |
| Mr Joseph Mercieca | Member Evaluation Board (Administrative) |
| Ms Doreen Mintoff | Member Evaluation Board (Financial) |
| Dr Veronique Dalli | Legal Representative |

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

Dr Matthew Paris on behalf of his client the appellant firm said that his client's tender had been disqualified for having failed to submit the original bid bond. He referred to page 22 of the tender document stated that *"I acknowledge that the Marsaskala local council shall request rectifications in respect of incomplete/non-submitted information pertinent to the documentation listed in Clause 11 (a) [The Bid-Bond], 11 (b), and 11 (c) if this tender form. We understand that such rectification/s must be submitted within two (2) working days,"* He admitted that it was true that the original bid-bond had not been submitted, but however a copy had been submitted. Subsequently on the 3rd February 2014, the day after the closing date of the tender, following contact with the Executive Secretary of the contracting authority, the original bid bond was submitted together with a covering explanatory letter. This was done according to the tender document, within two days from the request. He claimed that substance should always prevail over form and stated that this principle had always been affirmed both by the PCRB, the European Court and the Courts of Justice. What mattered is that the evaluation board would be able to evaluate bids of different bidders. In this context he referred to the tender's Clause 20.1 wherein it is stated that *"the tender guarantee (bid bond) is intended as a pledge that the tenderer will not retract his offer up to the expiry date of the guarantee."* It is therefore clear that with the copy and with the original submitted on the morrow, and therefore the evaluation of the bids could continue. The original had in fact been accepted by the Executive Secretary. After all it could be seen that appellant's option two was the cheapest offer. This was a case of a genuine mistake that had been rectified.

Dr Veronique Dalli on behalf of the contracting authority before making submissions asked that the evidence of the Executive Secretary be heard.

Mr Joseph Grech, Executive Secretary of the Marsaskala Local Council, under oath said that the tender had been opened by him, his colleague and another two councillors. He discovered that appellant's tender did not contain the original bid bond and this fact was noted down in the schedule of tenders and published. According to the Public Procurement Regulations, bidders had to submit two copies of their tender, one the original in a package together with another copy, marked so in another package. The copy could not be opened at that stage but it was thought that the original bid bond could have been inserted in the copy package. That was the reason he had phoned appellant to see if the original bid bond could have been erroneously inserted into the copy tender. However during the telephone call he had been informed that the original bid bond was still at the appellant's having been inadvertently omitted from the tender submission. On being asked what could be done he had suggested that the original be sent with a covering note to be considered by the evaluation board, the only persons who could take any decision on the matter. He explained that the evaluation board was composed of the Chairman who is the Mayor, himself as the Executive Secretary and other members and he could not decide anything by himself. The evaluation board had been given guidelines how to proceed when adjudicating tenders by the Director of Contracts. The present tender involved European Funding, during the communication with the appellant he had made it clear that he could not decide the matter himself but asked the person to submit the original for the Evaluation Board's consideration. The evaluation board had not yet met. He had explained that he was not part of the decision making process. Whenever during adjudication of tenders the evaluation board deem that clarifications are necessary, I am informed and the clarifications are then issued always in writing and are noted down in the minutes. In the present case the evaluation board had not

asked me to demand and issue any clarification. No clarification had been requested from appellant; I just asked the person on appellant's phone if they had inserted the original bid bond into the second copy package by mistake.

Replying under cross examination by Dr Matthew Paris the witness said that he had not drafted the tender document himself. He reiterated that he did not ask appellant for clarifications. According to the Standard Operations Procedures clarifications had to be in writing after approval by the General Contracts Committee. He reiterated that he had phoned the appellant only because when opening the tender it was found that appellant had not submitted an original bid bond and it was a possibility that this had been inadvertently included in the second copy. It was during the telephone conversation that appellant or his representative admitted having the original and that it was not inserted with the tender. He explained that clause 11(a), this is the declaration signed by bidders, reads "*our tender submission has been made in conformity with the instructions to tenders and in this respect we confirm having included in the appropriate packages required the following documentation : Tender Guarantee (note1)*". Note 1 state that tenderers will be requested to clarify/rectify within two working days the tender guarantee only in the following two circumstances: either the incorrect validity date and/or the incorrect value. He said that the evaluation board had sought the advice of the Department of Contracts and were informed that since the original bid bond was clearly requested then the submission of a copy was inadmissible and it was illegal to accept. This requisite clearly follows from the tenderers' declaration which also states that "we also understand that any disagreement, contradiction, alteration or deviation shall lead to our tender not being considered any further. Appellant had signed this declaration. He read over Article 12 "*I acknowledge that the Marsaskala local council shall request rectifications in respect of incomplete/non-submitted information pertinent to the documentation listed in Clause 11 (a) [The Bid-Bond], 11 (b), and 11 (c) if this tender form. We understand that such rectification/s must be submitted within two (2) working days and will be subject to a non-refundable administrative penalty of €50 and that failure to comply shall result in our offer not being considered any further.*" Dr Matthew Paris asked witness to explain why there was a contradiction between the clauses where one allows rectification and the other not. Dr Veronique Dalli objected since this was an incorrect interpretation of the clauses according to the appellant.

Replying to the Chairman's query if he was involved in the drafting of the tender witness said that he was not involved but whoever drafted had sometimes consulted him.

Dr Paris insisted that the tender had two conflicting clauses one allowing rectification and the other not. He wanted to ask witness how he could allow this.

The Chairman pointed out Clause 16.1, falling under note 1. "*Tenderers will be requested to clarify or rectify within two working days the tender guarantee only in the following two circumstances either incorrect validity date or incorrect value.*"

Dr Matthew Paris insisted that Clauses 16 and 12 have the same importance. Article 12 states that anything may be rectified. He wanted to produce Ms Antonella Calleja as witness but however it resulted that this witness was present during the hearing.

Dr Veronique Dalli on behalf of the contracting authority objected to the production of this witness because it was procedurally incorrect. Submissions had been made and witness was present during the hearing.

Mr Desmond Mizzi on behalf of appellant under oath testified that it was not true that the appellant was contacted by the secretary of the contracting authority. It was only when the tender award notice was received that it was immediately discovered that the original bid bond had not been sent with the tender. Ms Antonella Calleja had phoned the contracting authority to inform them of this. She had spoken to the clerk on duty who had said that the executive secretary was not present and had offered to phone him. He said that the copy of the bid bond was enclosed with the tender and the bid bond is issued specifically by the Bank for a specific tender, and this cannot be cancelled or withdrawn.

Mr Joseph Grech on behalf of the contracting authority while understanding the unfortunate incident as being a genuine mistake said that he was directed by the Department of Contracts to disqualify bidder if an original bid bond was not submitted. The tender is clear that an original guarantee had to be submitted.

Dr Matthew Paris on behalf of the appellant said that there is agreement on the facts of the case. He stated that however there is no agreement on who initiated the telephone conversation between appellant and the secretary. But irrespective of this a question had been made to appellant about the bid bond. He claimed that any question shall be deemed to be a clarification. It was clear that a clarification request was made verbally; and the tender document does not specify how clarifications should be made. Subsequently the original bid bond was sent together with an explanatory note. He insisted that there are two contradictory provisions in the tender one requiring the rejection of the offer if the bid bond was not included, while the other affording rectification. A similar case had been decided by the PCRB in the case KTF Limited vs Housing Authority where substance overruled form. In the present case substance results from Article 20.1 that explains why guarantees are required. Also at page 38 provision 8 of the tender states that the person signing this questionnaire guarantees the truthfulness and accuracy of all the statements, and this included the guarantee. He said that appellant's tender allowed an objective comparison to be made and appellant's offer was the cheapest. He contended that appellant's bid should not have been discarded for a genuine mistake. No law would have been broken had appellant's bid not been discarded.

Dr Veronique Dalli said that there was agreement that the original bid bond had not been submitted and that appellant's offer was the cheapest. She affirmed that a question cannot be deemed to be a clarification demand about non-submitted documents. Clarifications had to be on submitted documents. It was only the evaluation board who could ask for clarifications and Article 3.8.1.6 of the Standard Operations Procedures Guidelines explained how these could be made – “where clarifications are required communication is to be done in writing after approval by the evaluation board.”

She reiterated that the bid bond can only be rectified for the date or the value. Clause 20.1 was clear that non submission of the original bid bond led to rejection of tender

Dr Matthew Paris for the appellant said that evaluation boards can only contact bidders through clarification and insisted that Clause 16 cannot override Clause 12.

Dr Dalli disagreed.

Mr Desmond Mizzi said the bid bond was after all not the piece of paper submitted with the tender but the monies held by the bank to guarantee the bidder's offer.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 28th March 2014 and also through Appellant's verbal submissions during the hearing held on 6th May 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant claims that his offer was discarded due to the fact that he failed to submit the original Bid Bond as requested in the tender document. He further contends that upon request by the Evaluation Board this requisite was complied within two working days.**
- b) Appellant also maintains that he had submitted a copy of the original bid Bond.**
- c) The non submission of the original guarantee, in the first place was a genuine mistake.**
- d) Appellant contends that there were two conflicting clauses in the tender document, namely, clauses 12 and 16.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 6th May 2014, in that:

- a) Appellant confirms that the original bid bond was only submitted after the Contracting Authority enquired of its absence.**
- b) The Evaluation Board were directed and advised quite rightly, that once the original guarantee was not included with the tender document, then Appellant's bid had to be discarded.**

Reached the following conclusions:

- 1. This Board opines that, although it agrees and upholds the principle that 'substance should always prevail over form'. At the same time, this Board strongly feels, that this 'maxim' should not be used as a defensive and protective excuse for not filing the mandatory requirements as specified in the tender document. All essential original documentation as dicated in the tender document has to be submitted.**
- 2. With regards to the enquiry sought by the Contracting Authority regarding the missing original guarantee, this Board notes that a clarification can only be sought by the Evaluation Board on documentation submitted and not otherwise. In this case, the original Bid Bond was not submitted by Appellant.**
- 3. This Board refers to Clause 16.1 under note 1 of the tender document that quotes: "Tenderers will be requested to clarify or rectify within 2 working days the tender guarantee only in case of either validity date or incorrect value". In this instance, this was not the case. It was only a case of non submission of the original documents.**

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

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancilleri
Member

30 May 2014