

PUBLIC CONTRACTS REVIEW BOARD

Case No. 695

MCH 176/2013

Tender for the Supply of Food Trolleys at Mount Carmel Hospital.

The tender was published on the 1st October 2013. The closing date was the 15th October 2013.

The estimated value of the Tender was €44,000 (Exclusive of VAT).

Two (2) bids had been received for this tender.

On the 18th February 2014 ECB Hotel & Catering Equipment Co. 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:

ECB Hotel & Catering Equipment Co. Limited - Appellant

Mr Charles Cutajar	Representative
Dr Jonathan de Maria	Legal Representative

The Catering Centre - Preferred Bidder

Ms Betty Cini	Representative
Mr David Theuma	Representative
Dr Franco Vassallo	Legal Representative

Central Procurement & Supplies Unit - Contracting Authority

Mr Gilbert Bonnici	Chairman Evaluation Board
Ms Alison Gatt	Secretary Evaluation Board
Mr Reno Grech	Member Evaluation Board
Dr Oriana Micallef Stafrace	Legal Representative

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

Dr Jonathan de Maria on behalf of the appellant said that his client's tender had been rejected for several reasons amongst which was that the target of a minimum of deliveries during the period 2010 to 2012 of €20,000 had not been reached and also because during the same period, appellant did not make a minimum of 5 deliveries of similar nature. He contended that this decision of the Evaluation Board effectively constituted a barrier to entry which prejudiced his client. Appellant was a new local firm that had made an otherwise valid bid for the first time and did not want to rely on the expertise of others to be able to participate in the tender. Appellant's tender should not have been rejected on the bases of these reasons. He contended that the contracting authority cannot impose such criteria on the bidders. The Chairman remarked that this has now been changed and these criteria cannot be set anymore.

Dr Jonathan de Maria insisted that it was in the interest of the public to obtain the best prices when making public procurements. In the present case it left only the two largest firms in Malta who would be compliant and therefore was discriminatory against appellant. He insisted that appellant's tender conformed to the tender's technical specifications. Yet the evaluation board chose the preferred bidder at a cost difference of €16,000 and this when the estimated value was just €44,000. The contracting authority should have seen that appellant's bid was in conformity with the specifications. One reason why his client's bid was discarded was because appellant's technical submission did not comply with the clause "*2 connected compartments which can be utilized separately (i.e. one compartment for cold temperatures, the other compartment for hot temperatures).*" The compartments provided are not connected". However the tender document did not specify how the connection between the compartments had to be made. Dr de Maria presented and showed to the Board photographs of the compartments submitted by appellant. These showed that these two compartments gave you a choice to use one for cooling and the other for heating. Since the tender did not specify how the compartments should be connected then this could be subject to interpretation. Thus he contended that appellant's offer was fully compliant with the tender's technical requisites and should have been chosen to be awarded the tender since its offer was €16,000 cheaper.

Dr Oriana Micallef Stafrace on behalf of the contracting authority said that regarding the clauses 7.1 (B)(ii)2 and 7.1 (B)(ii)3, referring to deliveries and amounts, that is experience, when the tender was issued it was the norm to make such requisites. These were not clauses intended to discriminate in favour of any bidder. The experience requested in the tender was not limited to Government tenders but bidders could have listed private contracts as well or else could have formed a consortium. If appellant had some difficulty in interpreting the technical requisites appellant could have also asked for clarifications as per Regulation 6.1. (a) of the Public Procurement Regulations. She pointed out that the photographs submitted today were not the same as those submitted with the tender. From the submitted documents the evaluators could not see any connection between the two compartments. The connection between compartments was essential and needed for safety reasons and for stability. However from the appellant's submission it did not result that the compartments were connected.

Dr Franco Vassallo on behalf of the preferred bidder stated according to regulation 6 of the Regulations, before submitting a tender bidders if they felt that anything in the tender was

prejudicial to them they had the right and obligation to demand clarification. Bidders when signing the tender entered into a contract with the contracting authority and the other bidders. Once appellant chose to participate in the tender he was obliged to follow the conditions. Here he referred to Case number 663 decided by the Public Contracts Review Board where the same point had been dealt with. Appellant should have availed itself of the remedy offered by the Regulations. He affirmed that his client, the preferred bidder was totally compliant and playing in a level playing field and thus should be awarded the tender.

Dr Jonathan de Maria for appellant said that this tender was for two connected units but he alleged that the preferred bidder had submitted one unit and not two connected units.

At this point the hearing was closed.

This Board,

Having noted Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 18th February 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's offer was considered to be 'Administratively non compliant, due to the simple fact that Appellant did not possess the stipulated quota of deliveries for the years 2010 to 2012.**
- b) Appellant was a newly Formed Company and same opted not to rely on the expertise of third parties; however Appellant's offer was the cheapest.**
- c) Appellant contended that the technical specifications as dictated in the tender document were somewhat subjective, in so far as 'the connection required between one cabinet and the other', always referring to cold and hot compartments.**

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

- a) Although, regulations regarding experience have now changed, at the time of the issue of the tender, experience was one of the mandatory requirements.**
- b) Appellant could have asked for clarifications prior to submission of the tender document.**

Reached the following conclusions:

- 1. This Board opines that, at the time of the issue of the tender, the 'experience clause' was one of the mandatory requirements. The fact that the Appellant submitted and signed the tender document is clear evidence that Appellant accepted to abide by the conditions stipulated in the tender document. In this**

regard, Appellant knew beforehand that the ‘experience clause’ had to be satisfied.

- 2. The Appellant had the remedy to ask for clarifications regarding ‘administrative compliance’ prior to submission of his tender document. Appellant failed to avail himself of this opportunity. Clarifications are to be made prior to submission of the tender document.**

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

1 July 2014