

PUBLIC CONTRACTS REVIEW BOARD

Case No. 709

KMS/TEN/021/2013

Tender for the Provision of Collective Insurance Schemes Brokerage Services.

The tender was published on the 25th October 2013. The closing date was the 8th November 2013.

There was no estimated value of the Tender since Brokers are paid by commission for the Underwriters.

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

On the 6th March 2014 Island Insurance Brokers Limited filed an objection against award of the tender to Allcare Insurance Brokers 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 Tuesday the 10th June 2014 to discuss the objection.

Present for the hearing were:

Island Insurance Brokers Limited - Appellant

Dr Carmel Cascun	Representative
Mr Mark Spiteri	Representative
Dr Alessandro Lia	Legal Representative

Allcare Insurance Brokers Limited - Preferred Bidder

Mr Eric Frantz	General Manager
Dr Simon Cachia	Legal Representative

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Mr Dunstan Attard	Chairman Evaluation Board
Mr Joseph Ludwig Cassar	Secretary Evaluation Board
Dr Peter Fenech	Legal Representative

The Chairman made a brief introduction wherein he explained that a Board member, Mr Richard Matrenza had informed him that he had a client relationship with someone at appellant's firm and therefore asked to be excused from being present at the hearing. The representatives of the parties present left it up to Mr Matrenza to decide as the Board had their confidence. Mr Richard A Matrenza at this point excused himself and left the hall. The appellant's representative was invited to make his submissions.

Dr Alessandro Lia on behalf of Island Insurance Brokers Limited addressed any preliminary pleas raised by the other parties and contended that the objection had been filed in time as required by Regulation 21, within 5 working days from the date when the award with all the conditions as stipulated in the tender, at clause 34.2, was communicated to appellant. This had been on the on the 27th February 2014 and the letter of objection was filed on the 6th March 2014 in time. He claimed that the contracting authority had changed the goalposts in this tender. Brokers are not paid any fees by the contracting authority, but are paid through a commission by the insurance company. The contracting authority changed the goal-posts and adjudicated the tender on the basis of the premiums which each bidder suggested for the insurer submitted by the bidder. Appellant had quoted several insurers, but two of these were mathematically cheaper than that of the preferred bidder. The preferred bidder's insurance premium €28,846 whilst the appellant's insurance premiums were €20,895 and €27,241. It is evident that the insurance proposed by appellant had cheaper premiums. He continued that through an email of the 14th February 2014, some of the bidders were asked to fill the enclosed information sheet. The same email said that bidders had to note that premiums listed would be only indicative and would be fine tuned if selected. Appellant had indicated the amount of €20,895 and indicated also that the insurer would consider a part sponsorship of this amount. The preferred bidder had indicated the amount of €28,846 but was ready to grant 50% of this as part sponsorship. The contracting authority interpreted this to mean that the real amount for the preferred bidder was thus half of the €28,846 at €14,000. The tender was adjudicated on this in spite of the fact that the amounts were supposed to be indicative only and subject to fine tuning. Dr Lia contended that his client's offer was the cheapest. On the second grievance, Dr Lia submitted that clause 37.2 of the tender stated that "*without KMS's prior authorisation, the Contractor and his staff or any other company with which the Contractor is associated or linked may not, even on an ancillary supply other services, carry out works or supply equipment for the project. This prohibition also applies to any other programmes or projects that could, owing to the nature of the contract, give rise to a conflict of interest on the part of the Contractor.*" It is a fact that the preferred bidder had indicated Allcare Insurance for the indicative premium. This was in breach of this clause. He asked whether the preferred bidder had in fact obtained the KMS's authorisation.

Dr Peter Fenech on behalf of the contracting authority said that the clarification request had been made on the 21st February 2014 at 16.52pm and the reply had been given by Mr Joseph Ludwig Cassar on the 22nd February 2014 at 11.00am. This is shown in document AIB 6 filed by the preferred bidder with the letter of reply to the objection. The preferred bidder had clearly indicated from whom the quotations would be requested. Allcare Insurance Brokers Ltd, the preferred bidder had clearly indicated that it would be using the services of Allcare Insurance Limited. KMS had replied that "you may proceed accordingly."

Dr Alessandro Lia said that it is evident that the clarification request by the preferred bidder was submitted late. The closing date for submitting the indicative premiums was strictly the 18th February 2014 and Allcare Brokers only submitted the request to use Allcare Insurance on the 21st February 2014 that is too late. The reply had been given on the 22nd February

2014. He insisted that his client had abided by these instructions. He also alleged that he had information that the contract with the preferred bidder has already been signed in breach of all the regulations and asked the Board to investigate.

Dr Peter Fenech on behalf of the contracting authority said if it was decided that the preferred bidder in this case should be another bidder, the contracting authority would abide by that decision. However since the policies were going to lapse, the contracting authority felt that it could sign the contract with the preferred bidder.

Dr Alessandro Lia submitted that in breach of every regulation which demands the suspension of the tendering process once an objection has been filed, the contracting authority had signed the contract. He claimed that the contract in question was thus null.

Dr Peter Fenech said that the first point to examine was that if there was a right of appeal in the present tender. This was for insurance brokerage, and since brokerage has zero value. It has to be considered whether the bartering process can be considered as a price or not. He then referred to the late submission of the letter of objection which should be decided by this Board. He did not agree that the goal-posts had been changed. It was very difficult to evaluate brokerage tenders since no value is involved. It was for this reason that the evaluation board had asked the bidders to produce the premiums, for evaluation purposes only, in order to have something to evaluate. It still remained a level playing field for all bidders. Regarding the alleged conflict of interest he said that it was clear that the contracting authority was well aware that the preferred bidder would be using Allcare Insurance Limited. He reiterated that if the decision to sign the contract was not correct then the contract would be reversed.

Dr Alessandro Lia said that the contracting authority had used the value of the premiums as a criterion to adjudicate the tender since bidders were found to be compliant. Therefore the objection was admissible. He contended that appellant had also offered an element of bartering without indicating the percentage. He finally contended that the objection could be filed because through the changing of goal-posts, the tender had been adjudicated on the value of the premiums.

Dr Simon Cachia on behalf of the preferred bidder referred the Board to his client's letter of reply dated the 14th May 2014. He said that as can be seen from document AIB 05 the 50% sponsorship was issued to the preferred bidder Allcare Insurance Brokers Limited and not to Allcare Insurance Limited. This shows that the tender was for brokerage and not for insurance premiums. The offer by the preferred bidder was in fact less than zero, -€14,000.

At this point the hearing was closed.

This Board,

Having noted the 'Preliminary Plea' raised by the Preferred Bidder, in that this Appeal should be declared null and void by this Board, due to the fact that the Appeal lodged by the Appellant Company was made 'fuori termini'.

This Board notes the following issues:

- 1. The objection made by the Appellant Company falls under regulation 21 of the Public Procurement Regulations, the value being less than Euro 120,000.**
- 2. In this regard, Appellant Company had five (5) working days, in accordance with clause 21. (3) of the Public Procurement Regulations, during which Appellant could lodge an Appeal to the decision taken by the Contracting Authority.**
- 3. All tenderers were notified of the ‘Award of the Tender’ on the 19th February 2014. The objection made by Appellant Company was dated 5th March 2014 and this date is well beyond the period of five (5) working days from the date of ‘notice of award’ as required per clause 21. (3) of the Public Procurement Regulations.**

In view of the above, this Board finds the Appeal lodged by the Appellant Company to be not in conformity with clause 21. (3) of the Public Procurement Regulations and thus this same Board finds this Appeal to be is null and void. However, this Board recommends that the deposit paid by Appellant should be reimbursed.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Richard A. Matrenza
Member

25 July 2014