

PUBLIC CONTRACTS REVIEW BOARD

Case No. 717

CT 2501/2013: Framework Contract for the Supply of Environmentally Friendly Envelopes

The tender was published on the 31st January 2014. The closing date was the 27th February 2014. The estimated value of the Tender was €55,085 (Excluding VAT)

Four (4) offers from two bidders have been received for this tender.

On 6th June 2014 Intermarkets Stationeries Limited filed an objection against the disqualification of their offers for being technically non-compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Friday the 11th July 2014 to discuss the objection.

Present for the hearing were:

Intermarkets Stationeries Limited - Appellant

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| Mr Omar Toutoungi | Representative |
| Dr Joseph Brincat | Legal Representative |

FT Supplies - Preferred Bidder

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| Ms Francine Mercieca | Representative |
| Mr Tonio Mercieca | Representative |
| Dr Alex Sciberras | Legal Representative |

Department of Contracts - Contracting Authority

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| Ms Michelle Lunetti | Chairperson Evaluation Board |
| Ms Emily Fiott | Member Evaluation Board |

Following a brief introduction by the Chairman wherein it was explained to the parties that a recording of the hearing was being made for the sole purpose of compiling the minutes, the appellants' representative was invited to make his submissions.

Dr Joseph Brincat on behalf of the appellants Intermarkets Stationeries Limited referred to the letter of objection his clients filed. He started by claiming that the contracting authority was breaking its own rules since one of the conditions of the contract stated that the envelopes have to be printed with the words "Gvern ta' Malta" and not in English. The evaluation board had claimed that everything in the tender should be in English and had disqualified appellants' bids because a certificate had been in German. Dr Joseph Brincat contended that there existed a difference between assessing the language used in the main clauses of the tender and that used in other certain documents. Previously similar certificates in German had been accepted and it is not possible to refuse documents written in any of the European Union's languages. Translations may be demanded and in the present case appellant has now produced such translation. The appellant had submitted an authentic original document issued by the German Government and this cannot be refused by the Maltese Government. The tender document itself allowed for rectification in such cases and appellants should have been invited to rectify within two days. Furthermore the clause requesting the submission of the certificate said "that the certificate issued by an independent recognized body shall be submitted with application or when requested to do so.", it was thus optional. The contracting authority should have asked for the production of a translation. He reiterated that the same certificate had been previously accepted by the same contracting authority that could not thus now refuse to accept it.

Ms Michelle Lunetti on behalf of the contracting authority said that the contracting authority could not ask the appellants to rectify their offers by submitting translations. The technical specifications, under which appellants offers were rejected did not allow for rectifications, only clarifications were allowed. Their offer was disqualified because of clause 6.3 of the General Rules Governing Tendering. These are on the Department's website. The clause states that "*The tender and all correspondence and documents related to the tender exchanged by the tenderer and the Central Government Authority/Contracting Authority must be written in English. Supporting documents and printed literature furnished by the tenderer may be in another language, provided they are accompanied by an accurate translation into English. For the purposes of interpretation of the tender, the English language will prevail.*" Appellants' tenders were not accompanied by a translation into English of the certificate in German.

Dr Joseph Brincat for the appellants referred again to Section 4 – Technical Specifications of the Tender document that clearly stated that the certificates had to be submitted either with the tender or when requested to do so. Furthermore the original certificate submitted with the tender carries the "Blue Angel" mark that is recognized throughout Europe and which is self-explanatory. The message that this mark provides is certification in itself.

Ms Michelle Lunetti filed a copy of the General Rules Governing Tendering. She insisted that there was no need for all of these rules to be incorporated into each tender issued.

Dr Alex Sciberras on behalf of the preferred bidder referred to Section 1.1 of the Instructions to Tenderers makes it clear that these instructions complement the General Rules Governing Tenders and explains where these Rules may be obtained. This meant that bidders had to familiarize themselves with these Rules before submitting tenders.

Dr Joseph Brincat for the appellants explained the principle that what is special derogates that which is general. He reiterated that Section 4 was clear in that "when requested to do so" meant that the item could be rectified. The documents referred to in this section formed part of the tender document and the bidders signed and accepted these. Appellants had submitted a certificate and it was accepted since they were not requested to submit it or a translation

again. Therefore the document had been acceptable.

Dr Alex Sciberras on behalf of the preferred bidder submitted that it was up to the bidders to submit complete tenders. He referred to Clause 4 of the Instructions to Tenderers which stated that “no variant solutions will be accepted.” Appellants had however submitted 3 different offers. He contended that on this point alone appellants’ tenders should have been disqualified.

Dr Joseph Brincat insisted that the criterion for the award of this tender was the price. He said that the price was disregarded and the appellants’ offer had been discarded even though (the certificate) had the recognized mark and that had after all been accepted previously by the Department of Contracts in previous tenders.

Ms Michelle Lunetti for the contracting authority referred to Clause 7.1 which specified what could be rectified or not. If previously the same certificates had been accepted this had been by different evaluation boards. The present board was satisfied that the certificates as submitted were not admissible.

At this point the hearing was closed.

This Board,

Having noted the Appellant’s objection, in terms of the ‘Reasoned Letter of Objection’ dated 6th June 2014 and also through Appellant’s verbal submissions during the hearing held on 11th July 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant’s offer was discarded due to the fact that the Certificate as dictated in clause 6.3 of the tender document was submitted in the ‘German’ language and not in English. Appellant contends that the submitted certificate was genuine and that the Contracting Authority was in duty bound to request a translation of same, within a period of 2 days as stipulated in clause 7.1 of the tender document;**
- b) Appellant contends that the same certificate (in the German Language) had been submitted by same, in the past and there arose no problem with regards to acceptance by the Contracting Authority. Now there seem to be a shift of goalposts;**
- c) Appellant claims that the Certificate (in the German Language) should have been accepted by the Evaluation Board and the latter Authority should have requested a clarification prior to discarding Appellant’s bid;**

Having considered the Contracting Authority’s verbal submissions during the hearing held on 11th July 2014, in that:

- a) The Contracting Authority maintains that Clause 6.3 of the tender document clearly states that any literature and correspondence accompanying the offer has to be in the English language or if in another language must be accompanied with a translation in the English language of the same documentation. This is clearly dictated in the said clause 6.3 of the tender document. Appellant did not submit such translation.**

Reached the following conclusions:

- 1. This Board has no doubt that the certificate in the German language which was submitted by Appellant was genuine. However, clause 6.3 of the tender document clearly states that “all supporting documents and printed literature furnished by the tenderer may be in another language, provided same documentation is accompanied by an accurate translation in the English language. For the purposes of interpretation of the tender, the English language shall prevail”. In this regard, Appellant failed to provide an accompanying translation of the certificate which was submitted in the German language. This Board upholds the Evaluation Board’s decision on this issue;**

- 2. Appellant Company is contesting the fact that under ‘Notes to clause 7.1.2 on page 5 of the tender document, the Contracting Authority had to clarify or rectify any incorrect and/or incomplete documentation within two working days from the date of notification. In this regard, this Board notes clause 7.1.3 of the tender document wherein it is clearly stated that ‘No rectifications shall be allowed but only clarifications on the submitted information may be requested by the Evaluation Board. In this regard, this Board opines that clarifications could only be requested by the Evaluation Board on submitted information and not on missing documentation. In this particular case, the mandatory translated version of the certificate, which was submitted by Appellant and which was in the German language was not accompanied by the requested translation in the English language. This Board upholds the Evaluation Board’s decision;**

- 3. The argument raised by the Appellant Company in that, in previous circumstances, certificates in a language other than English (without the necessity of an accompanied translation) used to be accepted, is not upheld by this Board, as the Appellant Company was fully aware of the requirements under clause 6.3 of the ‘General Rules Governing Tendering’. This Board also opines that, the conditions laid out in the tender document are to be strictly adhered to. After all, conditions imposed in the tender document, are stipulated to ensure a fair, just and transparent evaluation process. The Evaluation Board acted correctly in discarding the Appellant’s offer for failing to abide by clause 6.3 of the ‘General Rules Governing Tendering’.**

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 Ancillieri
Member

22 August 2014