

PUBLIC CONTRACTS REVIEW BOARD

Case No. 748

CT 3024/2014

Tender for the Supply, Installation and Commissioning of Furniture, IT Equipment and Medical and General Ward Items. Lot 5.

The tender was published on the 28th March 2014. The closing date was the 8th May 2014.

The estimated value of the Tender was €1,331,495.58 (Exclusive of VAT).

On the 9th September 2014 Triomed Limited filed a letter of objection objecting to the rejection of their tender.

Seven (7) offers were submitted for this lot number 5.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday the 16th October 2014 to discuss the objection.

Present for the hearing were:

Triomed Limited - Appellant

Mr Alex Vella	Director
Dr John L Gauci	Legal Advisor

Technoline Limited - Preferred Bidder

Mr Ivan Vassallo	Representative
Mr N Sammut	Representative
Mr J Borg	Representative
Dr Paul Gonzi	Legal Representative

Mater Dei Hospital - Contracting Authority

Mr John Attard Kingswell	Chairperson Evaluation Board
Mr Stephen Mercieca	Secretary Evaluation Board
Mr Charlot Muscat	Member Evaluation Board
Mr Joseph Muscat	Member Evaluation Board
Dr Adrian Mallia	Legal Representative

Department of Contracts

Dr Franco Agius	Assistant Director
Mr Kevin D'Ugo	Procurement Manager
Mr Oreste Cassar	Director
Dr Flora Cilia Pulis	Procurement Manager

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

Dr John L Gauci on behalf of the appellant explained that lot 5 of the tender consisted of many items. This objection is about one item of these, item number 11 hospital beds. In the form, which had the required number of beds pre-printed, bidders had to fill in the unit price and the total cost. This total should have amounted to the unit cost multiplied by the number. However appellant, in his tender, erroneously typed 1541.16 as the unit price instead of 1841.16. The total amount was correctly entered. Appellants then received a clarification request where it was stated that the total amount should be corrected since it was mathematically incorrect. The appellants replied and insisted that the total amount was correct and that the mistake was in the typing of the unit price. As a result appellants were informed that the tender submitted had been disqualified since the arithmetical correction offered by the evaluation board had not been accepted. The bid bond was confiscated for the same reason. When appellants genuinely gave an explanation about the typing error, their bid was disqualified with the contracting authority quoting clause 17.1 of the tender as the reason. This clause deals with arithmetical errors found in tenders and the contracting authority quoted 17.1(b) as the reason for disqualification. This article states that "*where there is a discrepancy between a unit price and the total amount derived from the multiplication of the unit price and the quantity, the unit price as quoted will prevail.*" Dr Gauci contended that this clause was not applicable in this case since the error was not in the multiplication but a genuine typing error. Since appellant had been asked for clarification, the explanation offered should have been satisfactory. The mistake was in the unit price and this should not affect the total amount. Appellant had confirmed a higher total and so the point raised by the Department of Contracts' letter of reply does not hold, since a higher total could mean appellant would not be awarded the tender.

Dr Gauci referred to several decisions of the European Court of Justice that were cited in the letter of objection, especially case 195/08 which dealt precisely with clerical errors in tendering. This judgement has been exhibited by the Department of Contracts with the letter of reply. He insisted that the total amount written down in the tender was correct and the contracting authority should not have reduced it.

The Chairman remarked that the reply to the clarification request by appellant had been "we accept all corrected prices with the exception of item 11". This was the reason for exclusion given by the evaluation board.

Dr John Gauci explained that the contracting authority had amended the total amount of appellants' bills of quantity while the mistake was in the unit price. That is why appellant did not accept the correction. While there was a mistake in the appellants' unit price there was not multiplication error.

Dr Adrian Mallia on behalf of the contracting authority insisted that it is a fundamental principle that all bidders are treated equally. For this reason regulations and rules like those of clause 17 of the tender have to be applied to all bidders. The tender prevails and this is supported by case law. It is clear that in the present case, clause 17 had to be applied. A discrepancy existed between appellants' unit price and their total offer. The regulation states that in such situations the unit price will prevail and gives directions to the procedure to be used when such discrepancies crop up. The contracting authority followed the clause to the letter, adjusting the total price and asked the appellant to accept the correction. Since appellants did not accept this the consequences were clear and clause 17.3 had to be applied.

Dr Franco Agius on behalf of the Department of Contracts said that the principle quoted by Dr Mallia formed part of the jurisprudence of the European Court. He said that in the letter of reply he had quoted a decision wherein the same principle had been accepted. This has also been since then accepted by local jurisprudence. The Department does not agree with the interpretation given by appellant. There is no obligation of asking extra clarifications. The judgement quoted by appellant does not apply in this case because it dealt with the procurement by the European Union itself. Appellant did not accept the correction made by the evaluation board and there were consequences for this action.

Dr John Gauci reiterated that appellants could not confirm the correction suggested by the evaluation board since there was no multiplication error involved. The error was a typing mistake where the typist typed “5” instead of “8” when filling in item 11. The total amount was correctly entered and the appellants were bound by that amount as submitted. Yet the contracting authority insisted on changing the total amount. He insisted that clause 17.1 gave the power to the contracting authority to correct arithmetical errors.

Dr Franco Agius insisted that since when the appellants’ unit price is multiplied by the number of beds the result is not the total amount written down, then there was no leeway. The contracting authority had to follow clause 17.

Dr Paul Gonzi on behalf of the preferred bidder said he agreed with this but wanted to add that clause 7.1 which stated that no rectification shall be allowed in the financial offer of the tender. Appellants are asking to rectify their unit price and this cannot be done.

Dr John L Gauci insisted that this would not have been rectification but clarification. It would not have affected other bidders to change the unit price since the total remained the same.

The hearing was at this point closed.

This Board,

Having noted the Appellant’s objection in terms of the ‘Reasoned Letter of Objection’ dated 9th September 2014 and also through Appellant’s verbal submissions during the hearing held on 16th October 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant feels aggrieved by the decision taken by the Contracting Authority, in that Appellant’s offer was disqualified due to the fact that there was an arithmetical error in Bid Form – Lot 5, under item 11 of the tender document. In this regard, Appellant Company contends that this was a genuine mistake and the Contracting Authority should have been aware of such a genuine error on the part of the Appellant. Appellant contends that his offer should not have been disqualified due to this arithmetical error.**
- b) Appellant claims that clause 17.1(b) of the General Rules Governing Tendering should not apply in this particular instance, as same submitted a credible explanation of the arithmetical error. Appellant also contends that whilst there**

was a typing mistake in Appellant's unit price, there was no error in the total amount.

Having considered the Contracting Authority's *'Letter of Reply'* and also through submissions by same Authority during the hearing held on 16th October 2014, in that:

- a) The Contracting Authority contends that Appellant failed to abide by clause 17.2 of the General Rules Governing Tendering, in that same did not accept the adjustment in the overall total bid. At the same time, the Contracting Authority had to apply Clause 17.1(b) of the General rules, which clearly states that 'Where there is a discrepancy between a unit price and the total amount derived from the multiplication of the unit price and the quantity, the unit price as quoted shall prevail'. Appellant was well aware of this regulation and the Contracting Authority, in this case, had no other option but to abide by Clause 17.1(b), to ensure transparency and 'equal level playing field' among all bidders.
- b) The Contracting Authority maintains that when one takes into consideration the stated unit price by the number units, the resultant total would differ from that stated by Appellant in Bid Form – Lot 5.

Reached the following conclusions:

1. With regards to Appellant's first grievance in that 'the genuine mistake in the unit price did not justify the disqualification of Appellant's bid'; this Board opines that quite correctly, the Contracting Authority was in duty bound to abide by 17.1(b) of the General Rules Governing Tendering. The Contracting Authority, cannot depart from regulations which are dictated to ensure transparency and a level playing field among all prospective tenderers. In this regard this Board upholds the Contracting Authority's line of action in that same Authority was correct in applying Clause 17.1(b) of the General Rules Governing Tendering.
2. With regards to Appellant's second grievance this Board opines that the Contracting Authority had to apply Clause 17.1(b) so that when the unit price, as quoted by Appellant, is multiplied by the number of units relating to the same unit price, the total derived there from differed from that quoted by Appellant in the Bid Form – Lot 5 schedule of the tender document. In this regard this Board does not uphold Appellant's claim that Clause 17.1(b) should not have been applied in this particular case.
3. This Board also took into consideration Clause 17.2 of the General Rules Governing Tendering wherein it is clearly stated that 'Once an arithmetical error is corrected by the Evaluation Committee, this is finally communicated to the particular tenderer and if the tenderer does not accept the adjustment, his tender will be rejected and his tender guarantee forfeited'. This Board does not

consider the Appellant's reply regarding this issue to represent a valid acceptance to the adjustment made by the Evaluation Committee.

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

4 November 2014