

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 760**

**CPSU/ECC/08/2014**

**Tender for the Supply of 30 Full Replacement Mattresses (Air Mattresses) to St Vincent de Paul Residence, Luqa.**

The tender was published on the 10<sup>th</sup> December 2013. The closing date was the 9<sup>th</sup> January 2014. The estimated value of the Tender was €33,000 (Inclusive of VAT)

Eighteen (18) bidders had submitted an offer for this tender.

On the 17<sup>th</sup> October 2014 Be Independent Limited filed an objection against the rejection of their offer.

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 Thursday the 13<sup>th</sup> November 2014 to discuss the objection.

Present for the hearing were:

### **Be Independent Limited - Appellant**

Mr Edward Tanti	Director
Dr Julianne Portelli Demajo	Legal Representative

There were no representatives from the preferred bidders **Sidroc Services Ltd.**

### **Ministry for Health - Contracting Authority**

Mr John Attard	Chairperson Evaluation Board
Mr John Privitelli	Secretary Evaluation Board
Mr James Carabott	Representative

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

Dr Julianne Portelli Demajo, on behalf of appellant made the following submissions:-

- i) Her client's tender had been disqualified because appellant had not included a list of deliveries for the years 2011 and 2012 and because the deliveries quoted for the year 2013 were less than €30,000 per annum as required in the tender's select criteria;
- ii) That this tender being a supply tender, there was no need to prove previous experience. There was no justifiable reason for making experience an award criterion since this was not a service or works tender;
- iii) That this point has been decided by the European Court of Justice where in the case C315/01 a list of principal deliveries had also been requested. The Court of Appeal decision stated that there was no need for this list since there was no utility in giving this information since what mattered was the quality of the product. The quantity or value of deliveries itself did not necessarily mean that the product was of good quality;
- iv) That these criteria were closing the doors to other new contractors from competing in public tenders.

The Chairman remarked that in fact as from the 1<sup>st</sup> January 2014 this criterion cannot be used validly anymore. The relevant circular was issued on the 16<sup>th</sup> December 2013 which was unfortunately just after the present tender's issue. Furthermore he remarked that the grievances listed by the appellant could have been raised before the closing date of the tender through a pre-contractual concern.

Dr Julianne Portelli Demajo said that appellant had not raised a pre-contractual concern because it was not realized that the criterion would be used as an award criterion.

Mr John Attard on behalf of the contracting authority said that the evaluation board adjudicates on the tender requisites. Appellant's tender was found to be non-compliant. The evaluation board sought advice on the matter from the Department of Contracts and was informed that the circular covered tenders issued after the 1<sup>st</sup> January 2014.

Mr John Privitelli stated that the instructions to tenderers article 9 explained that tenders would be decided on the Administrative, Technical and Financial criteria.

Mr Edward Tanti for the appellant remarked that the mattress offered by appellant was good and was fully compliant with the technical specifications of the tender. He said that appellant had felt that the criterion was inserted to ensure that bidders could supply the product. Appellant felt that it was not fair to disallow its tender on the administrative criteria. Appellant had the necessary experience.

Mr James Carabott on behalf of the contracting authority explained that in fact appellant had been awarded a subsequent tender.

At this point the hearing was closed.

**This Board,**

**Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 17<sup>th</sup> October 2014 and also through Appellant's verbal submissions during the hearing held on 13<sup>th</sup> November 2014, had objected to the decision taken by the pertinent Authority, in that:**

- a) Appellant contends that his offer was discarded by the Evaluation Committee due to the simple fact that Appellant did not conduct enough deliveries of the same product for the years 2011 and 2012. Appellant claims that this condition does not apply to supply of a product but rather for services being tendered for**
- b) Appellant maintains that the 'experience clause' does in fact limit the scope of fair competition.**

**Having considered the Contracting Authority's verbal submissions during the hearing held on 13<sup>th</sup> November 2014, in that:**

- a) The Contracting Authority maintains that it could only adjudicate a tender on the documentation so submitted by the prospective bidder and in this respect Appellant failed to qualify the experience criteria as dictated in the tender document;**
- b) Appellant was well aware that under article 9 of the 'Instructions to Tenderers' the award of the tender would be assessed on the Administrative, Technical and Financial criteria. Appellant's bid was non compliant.**

**Reached the following conclusions:**

- 1. This Board opines that the tender, which was issued prior to 1<sup>st</sup> January 2014, stipulated that the tenderer had to prove that same made a minimum amount of deliveries of the same product during the years 2011 and 2012. This was a mandatory condition in the tender document and it was credibly established that Appellant did not satisfy the 'experience clause'. In this regard, this Board upholds the Contracting Authority's decision to regard Appellant's bid as being non compliant;**
- 2. Although this Board agrees with Appellant's argument that the 'experience' clause does, to a certain extent, limit the scope of competition, however, this Board opines that any mandatory condition stipulated in the tender document must be strictly adhered to. This Board also points out that this 'experience clause' was rectified as from 1<sup>st</sup> January 2014, so that the scope of competition would be stretched to wider sphere and thus allow a further scope of fair and transparent tendering procedures and thus providing the eventualities of other**

**new commercial entities of competing for such public tenders. In this regard, this Board, cannot but abide by the conditions, as laid out in the tender document, in that Appellant's offer did not conform to the condition as laid out in the said document; in that he was fully aware of the qualifying terms of the tender requirements and at the same time, Appellant did not avail of the remedies which were available to him, prior to submitting his official tender bid. In this regard, this Board does not uphold Appellant's second contention.**

**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 Richard A. Matrenza  
Member

*21 November 2014*