

PUBLIC CONTRACTS REVIEW BOARD

Case 722

DCS/29/2012

Tender for the Leasing of Thirty Seven (37) A4 Energy Efficient Black & White Multifunction Printing Devices Including Full Service & Maintenance Agreement (FSMS) Over a period of Three Years Within the Ministry of Justice, Dialogue and the Family (MJDF).

The tender was published on the 8th January 2013 and the closing date was on the 1st February 2013.

The estimated value of the tender was €20,000 (Exclusive of VAT)

Four (4) bidders had submitted an offer for this tender.

On the 7th November 2013 Strand Electronics Ltd filed an objection against the decision to award the tender to Office Group Ltd since the devices offered by the latter do not meet the tender specifications. The Public Contracts Review Board had delivered its decision on the 27th January 2014 rejection the objection. On the 30th May 2014 the Court of Appeal had revoked that decision and had remitted the case back to the Public Contracts Review Board for this to decide on the question whether the preferred bidder's product meets the tender specifications or not.

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 22nd July 2014 to discuss the objection.

Present for the hearing were:

Strand Electronics Limited - Appellant

Mr Ray Azzopardi	Representative
Dr Mark Portelli	Legal Representative
Mr Giorgio Sammut	Representative

Office Group Limited - Preferred Bidder

Mr Anthony Micallef	Managing Director
Mr Joe Camilleri	Executive Sales Consultant
Mr Robert Micallef	Chief Executive Officer
Dr Lorna Mifsud Cachia	Legal Representative

Ministry for the Family and Social Solidarity - Contracting Authority

Mr Jean Paul St. John	Member Evaluation Board
Mr John Degiorgio	Director Corporate Services

The Chairman declared that in this case there was nothing to be done but for the Public Contracts Review Board to adhere to the decision handed down by the Court of Appeal in the case number 42/14, “Strand Electronics Limited vs Direttur tal Corporate Services fil-Ministeru tal Gustizzja, Djalogu u Familja; u Office Group Limited,” and decide on the matter whether the preferred bidder’s product meets the tender specifications or not. The Board would thus be appointing an independent expert to help it decide if the product conforms or not to the specifications.

Dr Mark Portelli for the appellant asked whether appellant would be able to submit documents to the expert. He insisted that the documents appellant had filed during the previous hearing were not in the papers available to the Court of Appeal and asked to be allowed to file the papers again. Dr Mark Portelli here filed a note containing some documents.

Dr Lorna Mifsud Cachia protested that the appellant should not be allowed to file new documents. She insisted that if any new documents are exhibited her client should be given a copy and allowed time to rebut them.

The Chairman explained that the Board would only be relying on the evidence already before the Board and will not consider any other document. The Board would rely solely on the advice it is given by the expert whether the preferred bidder’s product was according to specifications or not. The documents filed today will not be passed to the expert.

Dr Lorna Mifsud Cachia insisted that the documents should not be accepted and made a formal request that in view of the fact that it was declared that the documents filed today by the appellant, are not being taken into consideration by this Board or by the expert to be appointed, she asks that these documents, filed today be removed from the records of the case. Furthermore it is pointed out that the preferred bidder was not afforded a copy and so has no means to rebut. This goes against the principle of natural justice.

Dr Mark Portelli for appellant with reference to the request by the preferred bidder states that the documents in question are the same that had been filed previously and so the preferred bidder already has a copy.

Mr John Degiorgio for the contracting authority said that this tender has been pending for two years at a cost to the department. He asked whether the expert would consult the contracting authority or not.

The Chairman replied that the expert would see the tender document and the documents already submitted. The expert will be appointed today and the Board would deliver its decision immediately the report is finalized.

Dr Mark Portelli demanded to see the Department file containing the previous procedures before this Board.

The Chairman said that since the file also contained the offers of the other bidders the request could not be acceded to. He reiterated that the documents filed today during the hearing will not be taken into consideration neither by the Board nor by the expert.

At this point the hearing was closed.

Second Hearing:

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Wednesday the 29th October 2014 to continue hearing the objection.

Present for the second hearing:

Strand Electronics Limited - Appellant

Mr Ray Azzopardi	Sales Manager
Mr Giorgio Sammut	Representative
Dr Mark Portelli	Legal Representative

Office Group Limited - Preferred Bidder

Mr Robert Micallef	Chief Executive Officer
Dr Lorna Mifsud Cachia	Legal Representative

Ministry for Family and Social Solidarity - Contracting Authority

Mr John Degiorgio	Director Corporate Services
Mr Jean Paul St John	Member Evaluation Board

Mr David Abela the expert appointed by the Board to state whether the printers submitted by the preferred bidder were according to specifications confirmed his report under oath. He explained that at the time of issue the tender was correct but however there were some misinterpretations of specifications that were irrelevant for the function of the printers. Also the tender had no sufficient specifications regarding the protocol. Replying to Dr Mark Portelli on behalf of the appellant, who insisted that the Court of Appeal had decided that in order to be according to specifications, the printers had to accept 60 to 210 gms paper from the two drawers, Mr Abela confirmed that from the document shown to him, the preferred bidder's machine took paper from 60 to 90 gms/square metre.

Replying to Dr Lorna Mifsud Cachia for the preferred bidder, Mr Abela could not confirm specifications. The relevant specification about the machine taking 210 gm paper from both drawers was frivolous and superfluous. This specification was not important for the functioning of the printers. When asked by Dr Mifsud Cachia whether the preferred bidder's machine accepted paper from both drawers, Mr Abela replied that the preferred bidder's machine was according to specifications.

Dr Mark Portelli for the appellant insisted that both machines offered were not according to specifications.

Mr David Abela, the expert appointed by the Board continued that since the issue of the tender the technology had changed and MITA had changed and upgraded its IT systems. The present situation is that both machines offered by the appellant and the preferred bidder do

not work with the new system adopted by MITA.

Mr John Degiorgio for the contracting authority agreed with the expert's report. He stated that the contracting authority had abided with the law; but the situation is now ridiculous and cannot go on. The tender was valued at €20,000 and 3 frustrating years have passed since its issue.

Dr Lorna Mifsud Cachia for the preferred bidder said that the Court of Appeal had decided that the appellant's machine was not according to specifications. The expert had to state whether the preferred bidder's machine was according to specifications or not and he has confirmed that it was.

Mr John Degiorgio insisted that the contracting authority cannot be forced to accept machines that no longer fitted in with the new technology being used by MITA.

The Chairman remarked that both machines are now outdated, and will not work with the present system used by the contracting authority. The original specifications were frivolous and non-compliance with them did not prevent the machines from working properly.

Mr Robert Micallef on behalf of the preferred bidder insisted that the machine offered by the preferred bidder could easily be upgraded to conform to the present situation.

Dr Mark Portelli for appellant insisted that specifications should be more generic and consider the salient points of the machines being offered and not include frivolous specifications.

At this point there was disagreement about whether the document being shown to Mr Abela was submitted by the appellant or by the preferred bidder. Appellant insisted that it was submitted by the preferred bidder.

Mr David Abela, the expert, confirmed that the preferred bidder's machine, the Bizhub 36, only accepts 60 to 90 gms from the main drawer. The machine could have more than one drawer but the documents were ambiguous and it was not clear that it could take 60 to 90 from both drawers. The literature states that for A5 and A4 the machine takes between 60 and 210 gms. But it is not clear if this referred to both drawers. The document does not clearly state that the machine accepted 60 to 210 from both drawers.

Mr Jean Paul St John on behalf of the contracting authority insisted that the supplier should have been clear in stating that paper capacity of 500 sheets at 60 to 210 gms/square meter; and again paper capacity of 150 sheets manual by-pass 60 to 210 gms. Thus it is not clearly indicated if this 60 to 210 gms can be taken from both drawers.

The hearing was brought to an end.

Third hearing

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 January 2015 to continue hearing the objection.

Present for the hearing:

Strand Electronics Limited - Appellant

Mr Ray Azzopardi	Sales Manager
Mr Giorgio Sammut	Representative
Dr Mark Portelli	Legal Representative

Office Group Limited - Preferred Bidder

Mr Robert Micallef	Chief Executive Officer
Dr Lorna Mifsud Cachia	Legal Representative

Ministry for Family and Social Solidarity - Contracting Authority

Mr John Degiorgio	Director Corporate Services
Mr Jean Paul St John	Member Evaluation Board
Mr Clifford Schembri	Member Evaluation Board
Ms. Joanne Zarb	Representative
Mr Dylan Gerada	Representative

The Chairman explained that the Board had appointed an expert but was not satisfied with the conclusions the expert reached. Since the Court wanted to know if the equipment of the preferred bidder could have two drawers that complied with the tender requirements the Board had appointed another expert, who was a professor of engineering to prepare another report that had been also handed out to the parties involved. The present hearing was intended for the Board to ask some questions to the expert and no debates would be allowed.

Professor Joseph Cilia, ID no. 1328667M, appointed by the Board, under oath, and replying to a direct question by the Chairman whether the photocopier offered by the preferred bidder was technically compliant with specifications in both drawers, replied that **yes, the machine was so compliant**. Replying to questions by Dr Mark Portelli who was appearing for the appellant, who contended that page 41 of the systems specifications did not state that the machine accepted the 60 to 200 gms from both drawers, the witness said that he understood that if the specifications did not state that it did not accept the paper from both drawers, then it could be assumed that it did.

Dr Mark Portelli insisted that page 40 of the specifications it was stated that “PC 211 paper feed cabinet – 60 to 90 gsm.”

Professor Joseph Cilia explained that the technical specifications in detail show 60 to 200. These state “printable paper size” and “printable paper weight” 60 to 210 gsm. He had to evaluate from the documents containing the specifications. He explained that the Bishub offered by the preferred bidder had two drawers each taking 500 from A4 to A6 sheets and another tray taking 150 sheets. The machine has 3 drawers – two drawers and a tray. It has an additional feature in that it can print duplex but if duplex is required then the paper can only be between 60 and 90 gsm. As a technical person he does not go into the preliminary introduction write-ups but goes straight into the technical specifications, in this case at page 41, and based his opinion on these.

Dr Mark Portelli for the appellant reiterated that he had submitted downloaded literature that showed that the preferred bidder’s machine accepted 210 gms only from one tray.

Professor Joseph Cilia explained that the tender specifications asked for a standard 500 sheet drawer plus 150 sheet multipurpose tray. The appellant’s machine has two drawers of 500 sheets and a 150 sheet tray. One of the drawers was over and above and according to specifications accepted paper of 60 to 210 from both drawers. He said that probably the reference to PC 211 referred to an extra accessory. When printing duplex the machine accepted paper weight of 60 to 90.

Dr Mark Portelli demanded that he be allowed to show witness documents filed by appellant in context with the procedures in the first hearing. This in order to confirm if both drawers – that is the bypass tray and the drawer accept 60 – 200 gsm paper. This was the subject matter of this objection. The specifications referred to by the expert only state the printable paper weight and not of both drawers.

Dr Lorna Mifsud Cachia on behalf of the preferred bidder demands that this request be rejected for the following reasons: 1. The brochure presented by appellant was issued for the American market and was not issued by Konica Minolta Europe. 2. The preferred bidder had filed documentation consisting of a DVD showing clearly that the machines offered by the preferred bidder had two drawers both accepting paper weight 60 to 210 gsm; and a letter from Konica confirming that the machine accepts these weights from both drawers. Thus the brochure that had been filed by the appellant contained incorrect information and is not credible.

The Chairman did not accept appellant’s demand to show witness the documents since the expert had been provided with the tender documents and the preferred bidder’s tender submission.

The hearing was closed.

This Board,

Having adhered to the Court of Appeal’s Decision through which this Board was directed to determine whether appellant’s contention that the Preferred Bidder’s offer was technically non-compliant, in that the “product offered by preferred bidder does not meet the required technical specifications as laid out in the tender document” was correct or not;

Reached the following conclusions:

- 1. This Board, after having appointed a technical expert to determine this long outstanding issue, was still not satisfied as to the conclusion reached by the appointed expert, in that the requested conclusion by the Honourable Court of Appeal was not, in this Board's opinion, reached or concluded. In this regard, this Board decided to appoint another expert to establish a clear technical opinion. This Board appointed associate Professor Joseph Cilia to deliberate the technical compliancy of the Preferred Bidder's offer.**
- 2. From the technical report drawn up by the second appointed technical expert, and from the explanations he gave during the third hearing, it transpired that the Preferred Bidder's product was technically compliant.**
- 3. This Board also emphasised the fact that although the tender document was not drawn up to the required standard, adequate technical specifications were dictated in the same document to permit the Evaluation Committee to reach to the award of same. This Board established, through the third hearing appointed expert's submissions that the 'two drawers' of the product offered by the Preferred Bidder was in line with the technical specifications dictated in the tender document.**

In view of the above, this Board opines that it has honoured the Honourable Court of Appeal's decision and in this regard, it decides that the preferred bidder's product does meet the required technical specifications. For this reason finds against the appellant company and recommends that the deposit paid by the appellant should not be reimbursed.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

22 January 2015