

PUBLIC CONTRACTS REVIEW BOARD

Case No. 814

CT 3162/2014

Tender for the Supply, Delivery and Installation of Energy Efficient Equipment and Furniture Produced with Environmentally Friendly Materials for the MCAST Students' House (Lot 4).

The tender was published on the 12th August 2014. The closing date was the 30th September 2014. The estimated value of the Tender was €320,088.98 (Exclusive of VAT)

Six (6) bidders had submitted an offer for Lot 4 of this tender.

On the 18th May 2015 Best Deals International Limited filed an objection against the decision taken by the contracting authority to find their offer for this lot technically non-compliant.

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 4th June 2015 to discuss the objection.

Present for the hearing were:

Best Deals International Limited:

Mr Mark Spiteri	Representative
Dr Mark Vassallo	Legal Representative
Dr Edward Gatt	Legal Representative

Vivendo Projects Limited:

Mr Christopher Gauci	Representative
Ms Emma Fenech Cefai	Representative

Malta College for Arts, Science And Technology:

Perit Alexis Inguanez	Chairperson Evaluation Board
Mr Stephen Cassar	Secretary Evaluation Board
Mr Mark Theuma	Member Evaluation Board
Dr Peter Fenech	Legal Representative

Department of Contracts:

Mr Kevin D'Ugo	Procurement Manager
Dr Chris Mizzi	Representative

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

Dr Edward Gatt on behalf of the appellants Best Deals International Limited referred to the letter of objection where their objections were clearly listed. He explained that this lot was for loose office furniture, and he emphasized "loose office furniture", and his clients' tender had been rejected because some items offered were a little over the threshold allowed for the dimension specifications. He cited as an example the desk. The tender had asked for 4 outlet holes for cable on the top and appellants' offer had been rejected because the desk submitted only had two cable outlet holes. He conceded the fact that some of the items offered by appellant were above the requested specifications. He maintained that a clarification would have settled the matter and that appellant would have provided the additional openings without additional costs. He contended that the contracting authority was obliged to ask for clarifications when there were slight differences between submissions and specifications. These could easily be remedied without costs, and he cited decisions given by the European Court of Justice stating this obligation, which were listed in the letter of objection. It was clear that in similar circumstances the evaluators should consider asking clarifications and not reject bids that could be remedied. He alleged that on seeing that the intended award price was three times more than that of the price offered by appellant, one would have serious doubts about the award. Appellant was tempted that instead of seeking redress through the present objection, to take the matter to another investigative authority. He said that the quality of appellants' furniture was good enough and quality was not the reason for disqualification. Dr Gatt insisted that the contracting authority should not have discarded appellants' offer without asking for clarifications. He reiterated that the award price was three times that of appellant and the contracting authority could have saved two thirds of the cost if only clarifications on minimal differences were sought.

Dr Peter Fenech on behalf of the contracting authority agreed that there was no contention about the quality of the furniture submitted by appellant. He said that the specifications requested were arrived at through previous experience of the contracting authority. The contracting authority, in order to open the tender to more bidders had allowed a tolerance of +/- 10% on the measurements of the items. This meant that a 20% window of tolerance was given to bidders. In 6 out of the 7 items for this lot, appellants' offer were out of tolerance by as much as 11%. This 10% tolerance was set in order to avoid undue discretion by the evaluators. Regarding the desk, it was only after the objection that the contracting authority became aware that an additional 2 outlet holes could be added. The original tender submission by the appellants did not explain this, was not in the documentation supplied. Financial constraints were of a concern to the contracting authority but the evaluators had to follow and abide with the rules. Alternative solutions should be declared by bidders clearly to be so in their tender bids.

The Chairman remarked that the technical specifications were set for guidance. If a bidder had an alternative solution, he should clearly declare the equivalence and justify it.

Dr Edward Gatt said that at the present state, once it was known that the awarded price was three times the appellants' bid, was it not right that the contracting authority should clarify whether the slight difference in appellants' offer justified rejection?

Dr Peter Fenech for the contracting authority insisted that clarification could not be asked for because there was no doubt about the information submitted by appellant. This however

went beyond the specifications. The contracting authority had to abide with the regulations. He agreed that there was a substantial difference in price but this could be precisely because of the different measurements.

The hearing was brought to a close.

This Board

Having noted the Appellant's objection in terms of the "Reasoned Letter of Objection" dated 18th May 2015 and also through their verbal submissions during the Public Hearing held on 4th June 2015 had objected to the decision taken by the pertinent authority in that:

- a) **The Appellants contend that its offer was unreasonably rejected by the Contracting Authority due to the fact that the items offered by them were beyond the tolerance stipulated in the Tender Document;**
- b) **The Appellants maintain that since their tendered price was the most advantageous, the Contracting Authority should have requested clarifications prior to the adjudication of the offers.**

Having considered the contents of the "Letter of Reply" dated 27th May 2015 and their verbal submissions during the Public Hearing held on 4th June 2015, in that:

- a) **The Contracting Authority established a tolerance on the various items of furniture of +/- 10% on the measurements. The Appellant's offer exceeded this tolerance to the extent that six out of seven items were of +/- 11% thus getting out of the stipulated tolerances;**
- b) **The Contracting Authority contends that in this particular "scenario", there was no room for clarifications as this would have resulted in a rectification.**

Reached the following conclusions:

1. **With regards to the appellant's first contention, this Board opines that the Technical Specifications in a tender document are not capriciously dictated, they are stipulated by the Contracting Authority to ensure "value for money" and that the supply of technical requirements are satisfied. In this particular case, this Board justifiably notes that the "allowed tolerance" of + / - 10% was more than generous and in this regard, this Board is credibly convinced that this generous tolerance was stipulated to ensure a more competitive participation of prospective bidders. This Board credibly notes that the Appellant's offer exceeded this tolerance and this was also confirmed by the latter. In this regard, this Board affirms that the decision taken by the Evaluation Committee was correct, fair and transparent. This Board does not uphold the Appellant's First Grievance;**
2. **With regards to the Appellant's second contention, this Board, after having heard credible submissions from the Contracting Authority, is justifiably convinced that although the Appellant's tendered price was much cheaper than**

the other contenders, the Evaluation Board had to select the most advantageous offer which was also fully compliant. This Board opines that there was no proven issue why the Evaluation Committee should have asked for clarifications, as, if it did, it would have been a “rectification”. In this regard, this Board does not uphold the Appellant’s second grievance.

In view of the above, this Board 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. Richard A. Matrenza
Member

9 June 2015