

PUBLIC CONTRACTS REVIEW BOARD

Case No. 856

CT 2171/2014

Tender for the Leasing of Low Emission Vehicles for MIP.

The Tender was published on the 20th February 2015. The closing date was the 7th April 2015. The estimated value of Tender is €205,627.12 (Exclusive of VAT).

Eight (8) offers had been received for this Tender.

On the 14th September 2015 South Lease Limited filed an objection against the decision of the Contracting Authority to award the Tender to 2000 Limited.

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 8th October 2015 to discuss the objection.

Present for the hearing were:

South Lease Limited

Mr Joseph Scicluna
Dr Edward Gatt

Director
Legal Representative

2000 Limited:

Mr Louis Pace

Representative

Malta Industrial Parks

Mr David Mifsud
Ms Ruth Borg
Mr Keith Buttigieg
Mr Ray von Brockdorff
Dr John Bonello

Chairperson Evaluation Board
Member Evaluation Board
Representative
Representative
Legal Representative

Department of Contracts

Dr Christopher Mizzi

Legal Representative

The Chairman explained that the Board had expected the Appellant to state why it was deemed that the Recommended Bidder was not technically compliant, and this should have been set down in the Letter of Objection. The Board would not allow having witnesses heard in an effort to counter a technical decision taken by the Evaluation Board. The Board also could not take over the responsibility given to the Evaluation Board to assess bids for technical compliance.

Dr Edward Gatt for the Appellant said that he wished to make some questions to someone from the Evaluation Board about the procedure followed after the evaluation process. He did not want to enter into the technical merits.

Mr David Mifsud, ID No. 217768M, the Chairman of the Evaluation Board, under oath said that the Tender had been awarded to 2000 Limited and that the Appellant company South East had been ranked number 2. The cars offered by the Recommended Bidder had satisfied the Tender specifications. The Evaluation Board had wanted some clarification and a clarification request had been sent to the Recommended Bidder who replied. This reply was accepted and satisfied the Evaluation Board, because the specifications were met. When some things in the Tender offer are not immediately clear to the evaluators, clarifications are sent out. In the present case the reply to the clarification was satisfactory.

The Tender did not require bidders to fill in a form stating which cars were being offered but they had to submit the literature on the cars being so offered. When examining the literature submitted by the Recommended Bidder the evaluators wanted to be clear on some aspects on one model being offered. Thus a clarification was requested from the Recommended Bidder. The Recommended Bidder replied and submitted new literature showing that the product complied with the specifications. The Tender allowed clarification and rectification for the submission of literature. Therefore the Evaluation Board had accepted the new literature since the nature of the car being offered was the same. The model of the car was the same and according to specifications. These clarifications were also sent to other bidders for the same reasons.

Dr Edward Gatt for the Appellant contended that what the witness referred to as rectification, was not rectification at all. The bidders had offered cars and not the brochures and when the new brochures were accepted it meant that not only the brochures were changed but the offered cars themselves. He cited a Public Contracts Review Board decision in case number 814 which dealt with furniture and Appellant in that case had not followed specifications. This Board had declared that “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”. He insisted that in the present case the change had been of the offered car and thus that the Evaluation Board had accepted a change in the specifications. The Evaluation Board had discarded the original specifications, moving the goal posts to advantage the Recommended Bidder.

Mr David Mifsud recalled to testify once more stated that the model vehicle offered by the Recommended Bidder was Citroen C3 and the awarded model was Citroen C3. However from the literature submitted with the Tender it was not clear if the model was Euro 5. In the reply, the Recommended Bidder re-submitted literature for model C3. The Evaluation Board took notice of clause 7.1.c.3 of the Tender Document at page 6 and decided that the literature could be rectified because it was qualified by note 2. This clause even allowed for any

missing documents to be submitted. The Recommended Bidder had replied to clarification and this reply had satisfied the Evaluation Board. Replying to a question by Dr Edward Gatt he said that the original bid had contained a photocopy of a page from a car brochure and the clarification reply had contained another photocopy from another brochure. This showed the same model of car but with another version, but it was still Citroen C3. The department file contains all the relevant documentation.

Dr Edward Gatt for the Appellant stated that now after this new evidence it is clear that a different version of the same model was submitted at the clarification stage. He contended that some versions of the Citroen C3 do not meet the Tender specifications. He continued to contend that in fact, the Recommended Bidder has been allowed to change his original offer and not just the literature.

Dr John Bonello on behalf of the Contracting Authority insisted that rectification was allowed by clause 7.1.c.3 since this was qualified by note 2. The case cited by Appellant was different because in that case it had been clear that no rectification was allowed. The Evaluation Board had interpreted the clarification reply as a change in the submitted literature and was rectifiable. He invited the Board to examine the Tender Document file.

Dr Edward Gatt for the Appellant pointed out that this reasoning was not correct since the clause refers only to literature but not to a change in the offered car.

At this point the hearing was closed.

This Board,

Having noted the Appellant's Objection in terms of the "Reasoned Letter of Objection" dated 14 September 2015 and also through the Appellant's verbal submissions during the Public Hearing held on 8th October 2015, had objected to the decision taken by the Pertinent Authority, in that:

- a) The Appellant contends that the Technical Specifications of the Recommended Bidder's vehicles were not in accordance with the Technical Specifications as dictated in the Tender Document;**

- b) The Appellant also maintains that following Clarifications sought by the**

Evaluation Committee, the latter accepted a change in the specifications from that submitted by the Preferred Bidder. In this regard, the Appellant contends that the Evaluation Committee had in fact, conceded to a change in the specifications of the vehicles being offered by the preferred bidder.

Having noted the Contracting Authority's "Letter of Reply" dated 30 September 2015 and the verbal submissions during the Public Hearing held on 8th October 2015, in that:

- a) The Contracting Authority maintains that the Appellant's Objection is based on alleged non-compliance of the Recommended Bidder's Technical Specifications of the vehicles. In this regard, the same Authority contends that the Technical Specifications of the vehicles offered by the Recommended Bidder was clarified and after examining the contents therein, the Evaluation Committee accepted the clarification submitted by the Preferred Bidder;**

- b) The Contracting Authority contends that through Clause 7.1.3 of the Tender Document, the Evaluation Committee could accept a rectification of literature as submitted by the Recommended Bidder as per note 2 of the same clause.**

Reached the following conclusions:

- 1. With regards to the Appellant's First Contention, this Board justifiably maintains that it is not the jurisdiction of this Board to delve into the Technical Compliance of the Recommended Bidder's offer. It is the Evaluation Committee's competence to ensure that what has been asked for is being offered**

by the Bidders. This Board will only adjudicate whether the Evaluation Process was carried out in a just and transparent manner.

From credible submissions made by the Contracting Authority, this Board notes that both the Appellant and the Recommended Bidder were Technically and Administratively compliant, so that the pivoting factor was the Financial Offer. This Board notes that the Recommended Bidder's offer was cheaper than that of the Appellant Company.

In this regard, this Board justifiably opines that the Evaluation Board carried out the proper procedure in arriving at the Award decision. In this respect, this Board does not uphold the Appellant's First Grievance.

- 2. With regards to the Appellant's Second Grievance, this Board, after having heard credible submissions by the Evaluation Committee and after examining the relevant clauses in the Tender Document, opines that Clause 7.1.c3 on page 6 of the Tender Document, with particular reference to "Literature", clearly states that rectification of same is permissible.**

The same clause under Note 2 even allows for any missing documentation, so that, the Evaluation Committee availed itself of this note in the Tender Document to assess whether the Recommended Bidder's offer was technically compliant enough.

This Board also contends that since the additional information, which was

requested through a clarification, was submitted and accepted by the Evaluation Committee, the latter acted in a diligent, fair and transparent manner. The Evaluation Committee followed the condition in Clause 7.1.c3 of the Tender Document.

At the same instance, this Board justifiably contends that the Evaluation Board did not change the specifications of the requested vehicle but simply accepted a rectification of the Literature submitted by the Recommended Bidder.

- 3. On a general note, this Board contends that the decision of Case 814 was taken in different light of the particular case, in that, the Tender Document of that case specifically did not allow for any rectification/missing documentation. In this particular case, clarifications, rectifications etc. were allowed.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the latter should not be reimbursed.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancillieri
Member

13 October 2015