

PUBLIC CONTRACTS REVIEW BOARD

Case No. 883

ARMS/T/4/2014

Tender for the Supply and Printing of Bills.

The tender was published on the 23rd December 2014. The closing date was on the 6th February 2015. The estimated value of the tender is €40,000.00 (Exclusive of VAT).

Four (4) offers had been submitted for this tender.

On the 4th November 2015 Velprint Limited filed an objection against the proposed award to Salander Group Co Limited for the amount of €38,861.90 Exclusive of VAT.

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 14th January 2016 to discuss the objection.

Present for the hearing were:

Velprint Limited:

Mr Vincent Vella	Representative
Dr Mark Vassallo	Legal Representative
Dr Edward Gatt	Legal Representative

Salander Group Co Limited – Print It Printing Services:

Mr Frans Jones	Representative
Mr Saviour Vassallo	Representative
Dr John Bonello	Legal Representative

Automated Revenue Management Services Limited:

Ms Pauline Lanzon	Secretary Evaluation Board
Mr Anthony Gauci	Member Evaluation Board
Mr Andre Muscat	Member Evaluation Board
Mr Mark Perez	Member Evaluation Board
Dr Lydia Abela	Legal Representative

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

Dr Edward Gatt on behalf of the Appellant said that the Appellant's First Grievance was that the validity period of the Tender had lapsed when the Recommended Bidder was informed of award of the award. This goes against Clause 34.1 of the tender that states that "*prior to the expiration of the period of validity of tenders, ARMS Ltd. will notify the successful tenderer, in writing, that his tender has been recommended for award by the procurement committee*".

The Contracting Authority had informed his client on the 9th October 2015 that the tender at that moment was being reviewed by the Department of Contracts. The Contracting Authority had admitted in the Letter of Reply that while tender was adjudicated on the 23rd September 2015 the letter to the Recommended Bidder was sent after the validity period had lapsed. The rules of the game had not been followed.

About the Second Grievance Dr Edward Gatt contended that although there had been around €8000 difference between the Appellant's bid and that of the Recommended Bidder, The Appellant's offer had included VAT at 18% while the Recommended Bidder had calculated VAT at 5%. The tender had stipulated in clause 17.3 that the offers had to be inclusive of taxes, customs and import duties. He contended that VAT at 5% was against the fiscal laws and the fact that the Contracting Authority had excluded the VAT content of bids went against the same tender requisitions.

Dr Lydia Abela on behalf of the Contracting Authority contended that the Appellant was confusing the date when the evaluation was concluded and the date when the result had been notified. The relevant clause states that the Contracting Authority "will" and not "shall" notify the successful tenderer, that is, after the award process was concluded. The recommendation for award had been made on the 23rd September 2015 well within the validity period which extended up to the 4th October 2015. There was no nullity of the tender since the award was made within the validity period while the Recommended Bidder had been notified on the 29th October 2015, but this did not render the tender null.

Mr Mark Perez, a member of the Evaluation Board, for the Contracting Authority, explained that the Evaluation Board had reached its decision on the 23rd September 2015 but had not asked for an extension because it was not realised that the DCC process would take so long. He cited a decision taken by the Ombudsman, and which was cited by the Appellant in the Letter of Objection, wherein it was held that in a similar occurrence, the tender in question was not held to be invalid but had stated that to exceed the invalidity period was not good practice.

Dr Lydia Abela for the Contracting Authority reiterated and insisted that the evaluation process had been concluded within the validity period. About the Second Grievance she explained that since there were some doubts regarding the VAT rate, and in order to ensure a level playing field, the Evaluation Board had based their adjudication of the net value of all the offers. She contended that even if 18% VAT was applied to the Recommended Bidder's offer it would still have been the cheapest.

Mr Mark Perez for the Contracting Authority said that the Evaluation Board had foresight when it decided to evaluate bids omitting VAT. Tenders are now issued asking to bids exclusive of VAT. He also pointed out that the Recommended Bidder's tender could have

been arithmetically corrected and not necessarily rejected because of the VAT. In this case however no corrections had been necessary.

Dr John Bonello on behalf of the Recommended Bidder pointed out that the tender had been issued before the date when the Customs Department had issued the Guidelines about the VAT rates. The Appellant had decided to apply an 18% VAT but this did not affect the tender in any way. VAT has to be paid accordingly. He contended that clause 34.1 cited by the Appellant referred to the successful bidder; it was clause 34.2 that dealt with the unsuccessful bidders. The Recommended Bidder had no issues with the notice of the award and accepted it. He contended that in the evaluating process everything was done in a transparent manner and with no discrimination towards any of the bidders and that the Public Procurement Regulations had not been broken.

Dr Edward Gatt for the Appellant reiterated that the Recommended Bidder had admitted being notified later than the validity period and also the wrong rate of VAT applied.

At this point the hearing was closed.

This Board,

Having noted the Appellant’s objection in terms of the “*Reasoned Letter of Objection*” dated 4 November 2015 and also through the Appellant’s verbal submissions during the Public Hearing held on 14 January 2015 had objected to the decision taken by the pertinent Authority, in that:

- a) The Appellant Company contends that the Contracting Authority had informed the Recommended Bidder of the result of the Evaluation Board after the validity period had lapsed;**

- b) The Appellant also maintains that, since the Tender Document stipulated in Clause 17.3 that bids had to include all taxes and VAT**

and since the Recommended Bidder's offer included an inferior percentage of VAT, the latter's bid was ranked as the cheapest compliant offer.

Having considered the Contracting Authority's "*Letter of Reply*" and their verbal submissions during the Public Hearing held on 14 January 2016, in that:

- a) With regards to the Appellant's First Grievance, the Contracting Authority maintains that the Notice of Award was made to the successful bidder after the award process was concluded. The recommendation of award was made on the 23rd September 2015, i.e. within the validity period and although the Recommended Bidder was notified on 29 October 2015, this should not render the Tender null.**

- b) The Contracting Authority contends that since there was no clear indication as to the rate of VAT applicable, the Evaluation Board assessed the offers of the quoted prices excluding VAT.**

Reached the following conclusions:

- 1. With regards to the Appellant's First Grievance, this Board, after having heard the submissions made by both the Appellant Company and the Contracting Authority, opines that although the Recommended Bidder was notified of the award on 29 October 2015, which date does not fall within the validity period, the Recommended Bidder did not raise any issue for this late notification.**

Although, this is not good practice, this occurrence does not invalidate the Tender. At this same instance, from documentation made available to this Board, the latter confirms that the actual Recommendation for Award was made on 23 September 2015, which is well within the validation period.

This Board credibly opines that the principle of "*Substance over Form*" should prevail and in this regard this Board does not uphold the Appellant's First Grievance.

- 2. With regards to the Appellant's Second Grievance, this Board justifiably opines that although the Tender Document requested offers to include all taxes & VAT, this should not preclude the**

Evaluation Board from comparing prices on an “*Exclusive of VAT*” basis.

This Board credibly approves the approach taken by the Evaluation Board in the absence of VAT payable on this particular tender and concludes that the assessment and comparison made by the Evaluation Board was conducted in a fair, just and transparent matter while keeping a level playing field.

This Board would also justifiably note that the fact that the Evaluation of the Tender was conducted on offers excluding VAT does not in any credible way alter or affect the ranking of the offers.

This Board would also like to point out that the VAT Rate of 18% is applicable to all bidders, so that if one had to calculate the offers submitted by both the Appellant and the Recommended Bidder to include a standard 18% VAT, the latter’s offer would still be the cheapest compliant offer. 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 latter should not be reimbursed.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

22 January 2016