

PUBLIC CONTRACTS REVIEW BOARD

Case No. 918

MEDE 409/2015: Framework Agreement for the Supply and Delivery of Various Stationery – For a period of 12 months, with an option to extend up to an additional period of 12 months – to St. Theresa College B’Kara, St. Thomas More College M’Xlokk, St. Clare College Pembroke, and the respective Primary and Secondary schools covered under these colleges.

The Tender was published on the 10th November 2015. The closing date was on the 1st December 2015. The estimated value of the Tender was €119,612.00 (Exclusive of Vat).

Three (3) offers had been submitted for this Tender, which consisted of five lots, and of which only Lot 2 was awarded.

On the 22nd February 2016 Smart Office Supplies Limited filed an objection against the decision of the Contracting Authority to disqualify its Tender.

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 29th March 2016 to discuss the objection.

Present for the hearing were:

Smart Office Supplies Limited:

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| Mr Joe Borg | Representative |
| Ms Lucienne Farrugia | Representative |
| Dr Carlos Bugeja | Legal Representative |
| Dr Keith A Borg | Legal Representative |

ASKA Trading Enterprises:

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| Mr Jonathan Muscat Baron | Representative |
| Dr Joseph Bugeja | Legal Representative |

Ministry for Education and Employment:

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| Mr Matthew Yeomans | Assistant Director |
| Mr Lawrence Spina | Representative |

The Chairman pointed out that although there were four different Tenders and objections for the day's hearing, the Board would only be hearing submissions in the present Tender since the other three Tenders were totally identical – the only difference being the colleges for which the materials were intended for. The submissions made in MEDE 407/2015 would be understood to apply also to the other three Tenders MEDE 408/2015, MEDE 409/2015 and MEDE 410/2015. He then made a brief introduction and invited Appellant's representative to make his submissions.

Dr Carlos Bugeja on behalf of the Appellant explained that his client had been deemed not compliant because it failed to submit a number of items. He admitted this but gave some examples of what the Tender had requested, in order to show that Appellant's Tender should not have been rejected in spite of not submitting everything requested. He stressed that the beneficiary of the Tender would be schools and pointed out that one of the items had been the Maze Street Map and he could not understand how this would be used by schools. Another item was number 2.023 – colour pencils that later resulted to have to be all black. He contended that his client could not offer these because these did not exist. He referred to the Recommended Bidder's Letter of Reply that stated that these were graded pencils but he refuted this because normally graded pencils come in 18 different sizes while the Tender asked for 12.

He contended that some items as requested do not exist or not used by schools because its use is banned. This opened the way to anyone with malicious intent to offer these items knowing well that the items would not have to be supplied. The Contracting Authority thus should not have made bidders to offer all the items as a mandatory requirement because it would be inviting abuses.

The Chairman pointed out that bidders had other remedies in the sense that they could have asked for pre-contractual remedies.

Dr Carlos Bugeja on behalf of the Appellant contended that his client had abided with clarification number 1 that stated: *"suppliers should quote for all items that are available according to the requested specs. Anything which is not available on the market should be marked NA (not available), and if the bids offered for such item/s are not compliant or no bidders submitted any bid for such item/s, these item/s will be excluded from the consequent award and the resultant total price on a common basis between offers will only be based on the list of available items in the respective lot/s."* His client had thus marked the items that he was not offering NA, and Appellant should never have been told that non submission of items had disqualified his offer. He contended that clause 3.2 referred to quantities and not to individual items and could not be used as a basis to find Appellant's offer non-compliant. The Contracting Authority was interpreting this clause incorrectly. It was quantities that had to be all submitted and not individual items and Appellant had failed to submit 17 out of 268 items.

Mr Matthew Yeomans on behalf of the Contracting Authority referred to the Letter of Reply. He explained that the Contracting Authority had issued four Tenders with five lots each but only one lot, Lot 2 was awarded in each of the Tenders. The reason for this was that for the other 4 lots, none of the bidders had offered all the items requested. The onus was on the bidders to prove the equivalence of any item offered to that requested; in fact bidders had been given three options to show equivalence. The Tenders had been prepared with the collaboration of the Heads of Schools involved and the items were not for use by children but

by the academic staff; hence the request, for example, of the Maze Street map. There was not a single item that all the bidders had failed to offer. Had this fact occurred then clause 3.2 would have come into effect and the item removed from the Tender. The prices requested from bidders had to be per item. The Tender requested quantities but the price had to be given per item.

Dr Carlos Bugeja for the Appellant countered that the price for a box of erasers containing 20 erasers was per box and not for a single eraser.

Mr Lawrence Spina, a member of the Evaluation Board, on behalf of the Contracting Authority explained that each lot of the 5 lots had to be offered as a whole and parts of a lot were not acceptable. This results from clause 3.2 in the Instructions to Tenderers which stated that “under no circumstances will Tenders for lot/s containing only part of the quantities required be taken into consideration.”

Mr Matthew Yeomans for the Contracting Authority explained also that clause 2 of volume 3 – Technical specifications said that *“for all required items in the lot (respectively for the ‘yes’ declaration in the ‘Item compliance’ field or for the ‘Yes’ declaration in the grouped lot compliance field), is exactly compliant by default. However any declarations towards compliance on an exact, equivalent or superior basis or otherwise towards non-compliance must be uniquely supported in the submitted documentation. Response in the ‘offered specification’ field for any item may also include the model number or product reference number as necessary”*. This was found on page 61 of the Tender. Tenderers had also to declare and justify where they submitted different from requirements.

Mr Lawrence Spina said that the Tender nowhere indicated that bidders could offer only part of a lot. Offers had to comprise the whole lot, and this meant all the items listed. Had any items resulted not offered by all bidders then these would have been removed.

Dr Carlos Bugeja for the Appellant said that the bidders had to follow the Tender Document and clarifications. One clarification explained that a bidder could quote for part of the lot. This was clarification number 1. This instructed Tenderers to mark any items not available on the market “NA” (not available) and this meant that Appellant had acted correctly when submitting the Tender with the missing items.

The Chairman remarked that he understood that the Tender was split into lots, but the lots could not also be split into parts. The Board understood that if certain items were not offered by all the bidders then these would be removed from the Tender but only if no bidder offered them. Since there were items that had been offered by all bidders the clause could not be put into operation.

Dr Carlos Bugeja for the Appellant explained that the Letter of Objection was meant to cover all four Tenders and all five lots in each. Appellant was objection the disqualification of his offers for the reasons set down in the Letter of Rejection.

Mr Matthew Yeomans for the Contracting Authority explained that only Lot 2 was awarded but the letters of rejection made this clear but did not mention that the other lots had been cancelled. He reiterated that no single bidder had offered all the items for the other lots and thus no bidder was compliant for the other lots.

Dr Joseph Bugeja on behalf of the Recommended Bidder pointed out that clause 3.2 emphatically made it clear that under no circumstances will Tenders containing only part of the quantities required be taken into consideration. He claimed that a new Directive that will come into force by the 18th April 2016 speaks on “size” and this means quantities.

The hearing was at this point brought to an end.

This Board,

Having noted the Appellant’s Objection in terms of the “*Reasoned Letter of Objection*” dated 22 February 2016 and also through their verbal submissions during the Public Hearing held on 29 March 2016 had objected to the decision taken by the Pertinent Authority, in that:

- a) **The Appellant contends that his offer was deemed to be non compliant due to the fact that he did not Tender for all the items as listed in the Tender Document;**

- b) **The Appellant also maintains that Clarification Number 1 did confirm that “*Any item which is not available on the market should be marked as N/A, (not available), so that, in the eventuality that some of the items, as listed in the Tender Document, did not exist or were no longer in use, was allowed by the Contracting Authority.*” In this regard, this Appellant could not quote for non-existing or obsolete items.**

Having noted the Contracting Authority's "*Letter of Reply*" dated 25 February 2016 and also their verbal submissions during the Public Hearing held on 29 March 2016, in that:

- a) The Contracting Authority maintains that it was made clear from the very start that bidders had to quote for all the items listed in the Tender Document. At the same instance, bidders were allowed to quote for equivalent items as long as supported documentation proved and submitted its equivalency. In this regard, the Appellant did not quote for 17 items;**

- b) The Contracting Authority contends that in Clarification Number 1, bidders were informed that should all of them fail to submit a quote for the same items, than these will be struck off from the Tender list so as to provide "*a level playing field for all*". In this regard, the Contracting Authority maintains that this was not the case.**

Reached the following conclusions:

- 1. With regards to the Appellant's First Grievance, this Board, after having heard the submissions of both the Appellant Company and**

the Contracting Authority and after having examined the relative documentation, opines that Smart Office Supplies Ltd confirmed and admitted that they did not quote for all the items whilst this Board justifiably referred to Clause 3.2 wherein it is vividly denoted that *“Under no Circumstances will Tenders containing only part of the quantities as dictated in the Tender Document will be taken into consideration”*. In this regard, this Board does not uphold the Appellant’s First Grievance.

- 2. With regards to the Appellant’s Second Grievance, this Board would refer and emphasise the reason behind Clause 2 of Volume 3 (Technical Specifications). The Contracting Authority instructed the bidders to mark those items which they could not quote for. In this regard, this clause would have been applicable if, certain items were not offered by all the bidders.**

The factual event shows that bidders did offer all the items as dictated in the Tender Document whilst the Appellant Company failed to do so. This Board justifiably opines that the decision taken by the Contracting Authority to deem the Appellant’s offer as non-compliant in accordance with Clause 2 of Volume 3 was correct and proper. In this regard, this Board does not uphold the Appellant’s

Second Grievance.

- 3. This Board is frequently being faced with appeals on matters which could have been avoided by applying a “*Pre-Contractual Concern*” or ask for Clarifications from the contracting Authority, prior to the submission of their offers. In this particular case, the points which were raised by Smart Office Supplies Ltd, with regards to the availability and obsolescence of items should have been clarified at the appropriate stage.**

It is the onus of the prospective bidder to seek as much information or clarifications of the dictated Tender Conditions as possible to ensure that all the requested information submitted is to the satisfaction of the Contracting Authority concerned.

- 4. This Board was informed during the Public Hearing that the Tender for this Lot has been cancelled as no bidder was compliant. However, this Board regrettably notes that the Appellant Company was not informed of this fact.**

Although the merit of this case is the submission of a non-compliant offer, this Board, as it had on many occasions, pointed out that the

Public Procurement Regulations dictate that “*Specific Reasons*” had to be given to unsuccessful bidders to provide the latter with fair and just grounds on which to object.

In view of the above, this Board finds against the Appellant Company, however in view of the above, this same Board recommends that the deposit paid by the Appellant should be reimbursed.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

5 April 2016