

PUBLIC CONTRACTS REVIEW BOARD

Case No. 925 – MCAST 19/2015: Tender for the Provision of Hair Products Lot 4.

The Tender was published on the 4th September 2015. The closing date was on the 18th September 2015. The estimated value of the Tender is €45,000.00 (Exclusive of VAT).

Seven (7) bidders had made offers for this Tender.

On the 20th January 2016 KMS (Malta) Limited filed an Objection against the decision of the Contracting Authority to discard its Tender for Lot 4 because not all items requested were quoted.

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 12th April 2016 to discuss the Objection.

Present for the hearing were:

KMS (Malta) Limited:

Mr Charles Agius	Director
Mr Josef Carl Rapinett	Educator
Ms Lara Zammit	Habia Representative
Dr Veronique Dalli	Legal Representative

Beauty Centre Limited:

Mr Yoland Spiteri	Representative
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Malta Collage of Arts, Science & Technology:

Dr Tatiana Chircop	Chairperson Evaluation Board
Ms Kathleen Cassar	Member Evaluation Board
Ms Josette Bonnici	Member Evaluation Board
Ms Jane Schembri	Purchasing Manager
Mr Stephen Cachia	Representative

The Chairman made a brief introduction and invited the Appellant's representative to make her submissions.

Dr Veronique Dalli on behalf of KMS (Malta) Ltd said that her client's offer was disqualified because Item 3 Additives for permanent colours was not offered. She said that these additives were only demanded for permanent colours. Dr Dalli explained that additives were substances that were added to the colour. She contended that intensifiers or enhancers are not considered to be additives, but are used according to the colours chosen.

KMS (Malta) Ltd had offered a product that incorporated this intensifier and thus did not need other additives. The trade does not consider intensifiers as additives. The Appellant in the Tender had therefore put down not applicable (N/A) in the appropriate column. Yet the Contracting Authority in its Letter of Reply contended that additives referred to intensifiers that are used to make the colours more intense.

Dr Veronique Dalli continued that in this regard Appellant had sought from 'Wella' regarding the definition of additives and the result was that this referred to substance that was meant to:

- a) Change the ph of the hair;
- b) Condition hair;
- c) Protect the scalp or
- d) Maintain durability of the colour.

Intensifiers were never referred to as additives. The advice of Habia was also sought with the same result that intensifiers were not additives. Therefore the Appellant had put down N/A in the Tender since no additives were needed for the specific product offered.

Mr Stephen Cachia for the Contracting Authority explained that the matter was purely technical and KMS (Malta) Ltd had been awarded three other lots. The Appellant had left blank an item in the list of requested items and the Evaluation Board had to reject the offer. For the Contracting Authority an 'intensifier' meant an additive, contrary to what being contended by the Appellant. At any rate, the latter could have asked for clarification if any doubts arose. However the Appellant did not and the Evaluation Board had to deem KMS (Malta)'s offer as non-compliant.

Mr Cachia pointed out that the letter from Habia which the Appellant presented today also stated that 'additive' meant any additional ingredient. The Contracting Authority needed the colour and enhancer to be separate in order to teach the students how to use them.

Ms Kathleen Cassar on behalf of the Contracting Authority, and member of the Evaluation Board, testifying under oath stated that the students are taught that in order to intensify or correct a colour, an additive has to be used with the colour. She contended that products that give enhancement and longevity to the product are in fact additives. The witness explained that an intensifier is not used in semi permanent colouring. A product that is added to avoid irritation of the scalp was dealt with as a pre-colour treatment in another lot. An intensifier increases the colour and the letter from Sam Cutajar agrees with this. The Appellant's Tender failed to offer an additive to be added to the colour to intensify the colour.

The Chairman remarked that the Appellant claims that the product had no additives to intensify colour whereas normally hair colour charts show both colours and intensifiers.

Mr Stephen Cachia reiterated that it was clear that an intensifier was an additive.

Mr Charles Agius ID No 40067M on behalf of the Appellant under oath said that lot 4 had different headings. The first was colour permanent and contained an item named 'additives'. Appellant understood that if intensifier was an additive it would have been also demanded in the semi permanent colour. There are intensifiers both for permanent and semi-permanent and are called mix shades. It was for this reason that it was understood that the item was not referring to intensifiers. No one in the trade called it additive when around twenty persons were contacted. Our firm has additives that give scalp protection, and oxygenators. There are also intensifiers used for permanent and semi-permanent colour. Most of the persons said that they use mix tones but were not asked about additives. Since item 3 was not asked for in the semi-permanent it was assumed that it was not an intensifier.

The Chairman decided that the Board would appoint an expert regarding lot 4 who is to say what he meant by additive in item 3.

Second hearing:

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members re-convened a hearing on Thursday the 30th June 2016 to continue the discussion of the the Objection.

Present for the second hearing were:

KMS (Malta) Limited:

Mr Charles Agius	Director
Ms Lara Zammit	Habia Representative
Dr Veronique Dalli	Legal Representative

Beauty Centre Limited:

Mr Yoland Spiteri	Representative
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Malta Collage of Arts, Science & Technology:

Mr Stephen Cachia	Chief Executive Officer
Dr Tatiana Chircop	Chairperson Evaluation Board
Ms Kathleen Cassar	Member Evaluation Board
Ms Josette Bonnici	Member Evaluation Board
Ms Jane Schembri	Purchasing Manager

The Chairman explained that the hearing was called in order to hear the testimony of the expert appointed by the Board, who was an impartial expert with no connection to any company in Malta.

Mr Andrea Serri, the appointed expert under oath said that he was a broker in the cosmetics industry and had contacts with both American and European distributors of cosmetics and hairdressing products. However he had no local connections or interests.

When asked by Dr Veronique Dalli about additives he explained that he understood additive to be anything that could be added to a colour or colouring preparation. An intensifier in hairdressing usually refers to any product that contains a pigment that would make the colour more vibrant and enhanced. The products usually found on the left of colour charts, rather than intensifiers, are called toners or tone correctors. At the bottom of the charts you usually find the primary colours that would work as intensifiers or tone correctors.

Replying to Mr Stephen Cachia he said that anything added to a colour is an additive. (Here the witness was shown the Tender Document). Mr Serri contended that the Tender wording was not clear enough because it could include intensifiers and additives or not. From the Tender wording, the witness would not be able to state if it were additive or intensifier and that probably he would have asked for a clarification.

The Chairman asked Mr Serri, whether from the Tender Document, the product could be classified as an intensifier or as an additive and how. Replying to this question by the Chairman, the witness said that in his opinion, the Technical Specifications had to be more specific.

Mr Stephen Cachia for the Contracting Authority insisted that it had only called for additives. It was only the Appellant that had used the word intensifier. If it was not clear then, the Appellant should have asked for clarification.

At this point the hearing was closed.

This Board,

Having noted the Appellant's Objection in terms of the "*Reasoned Letter of Objection*" dated 20 January 2016 and also through their verbal submissions during the Public Hearings held on 12 April 2016 and 30 June 2016, had objected to the decision taken by the Pertinent Authority, in that:

a) KMS (Malta) Ltd contended that its offer was discarded due to the fact that the Contracting Authority decided that they had left blank an item in the Tender, namely additives. In this regard, the Appellant maintains that its offer incorporated the intensifier which did not need additives;

b) KMS (Malta) Ltd also maintained that there is a difference between intensifiers and additives; hence an indicative N/A in the Tender Document was put down with regards to additives.

Having considered the Contracting Authority's "*Letter of Reply*" dated 19 February 2016 and also their verbal submissions during the Public Hearings held on 12 April 2016 and 30 June 2016, in that:

a) MCAST contends that the Appellant in his offer has omitted the inclusion of additives as mandatorily dictated in the Tender Document, thus the Evaluation Board had no other option but to discard the Appellant's bid as being Technically Compliant;

b) The Contracting Authority contended that the purpose of the product being tendered for was to educate hairdressing students on how to add any blend using colours and additives. In this regard, the

Contracting Authority emphasized the requirement of an additive;

- c) The Contracting Authority also maintains that there is no difference between an “*intensifier*” and an “*additive*”.**

Reached the following conclusions:

- 1. On a General Note, this Board, after having heard the submissions made by both parties during the first Public Hearing held on 12 April 2016, had established that the issue in this Appeal is the Technical Meaning of the words “*intensifier*” and “*additive*”.**

In this regard, this Board recognises that the issue is of a Technical Nature and with the consent of both parties, this same Board appointed an independent expert, namely Mr Andrea Serri, to assess the Technical Details of the Tender Document.

- 2. With regards to the Appellant’s First Grievance, this Board had credibly determined that the fact that KMS (Malta) Ltd did not include the details of an additive under Product No 3, does in fact raise the issue of why their offer was discarded without any sufficient explanation.**

This Board is treating the issue of “*Missing Information*” in the Tender Document and justifiably contends that the words N/A should have been more substantiated by the explanation given in their “*Letter of Objection*”. In the absence of such an important explanation, the Evaluation Board was correct in discarding the Appellant’s offer.

- 3. With regards to the Appellant’s Second Grievance, this Board, after having heard the Expert’s Testimony (Under Oath), opines that there does exist a difference between an “*intensifier*” and an “*additive*”. At the same instance, this Board notes that the purpose of the product being requested by MCAST, in its “*Letter of Reply*”, in that the product had to provide the opportunity for hairdressing students to learn how to add and mix the products to achieve the desired results.**

On the same issue, this Board would have been comforted had the Tender Document specified clearly the main objective of the product being tendered for.

This Board, after having examined the Expert’s Testimony, justifiably opines that although the Evaluation Board was correct in

discarding the offer submitted by KMS (Malta) Ltd for “*missing information*” with regards to “*additives*”, the Technical Specifications should have been more clear and specifically monitor the purpose of the product.

According to the Expert’s Testimony, the Technical Specifications had to be more specific. This Board rests its decision on the Expert’s Technical Opinion.

In this regard, this Board opines that the Tender for Lot 4 should be re-issued specifying the exact Technical Features required in the product so as to avoid confusion of interpretation of Terminology.

In view of the above, this Board recommends that:

- i) The Tender for Lot 4 is to be re-issued;**
- ii) The deposit paid by KMS (Malta) Ltd should be refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

5 July 2016