

PUBLIC CONTRACTS REVIEW BOARD

Case No. 938 – CT 2196/2015: Tender for the Engagement of a Destination Management Company for Events in Connection with the EU Presidency 2017.

The Tender was published on the 17th November 2015. The closing date was on the 7th January 2016. The estimated value of the Tender is €510,000.00 (Exclusive of VAT).

Six (6) offers had been received for this Tender.

On the 25th April 2016 Professional Meetings and Events filed an Objection against the decision of the Contracting Authority to discard their 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 Thursday the 19th May 2016 to discuss the Objection.

Present for the hearing were:

Professional Meetings and Events:

Mr Dean Micallef	Representative
Ms Sarah Muscat	Representative
Mr Hugh von Brockdorff	Representative
Dr Peter Caruana Galizia	Legal Representative

Special Interest Travel Limited:

Mr Jason Caruana	Representative
Mr Matthew Scicluna	Representative

Ministry for European Affairs and Implementation of European Manifesto:

Mr Anthony Camilleri	Chairperson Evaluation Board
Mr Adrian Dalli	Member Evaluation Board
Mr Arnold Farrugia	Member Evaluation Board
Mr Paul Mifsud	Member Evaluation Board

Department of Contracts:

Mr David Mizzi	Procurement Manager
Dr Christopher Mizzi	Legal Representative

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

Dr Peter Caruana Galizia on behalf of the Appellant explained that his client's Tender had been rejected for enclosing the wrong Financial Bid Form which was downloaded from the e-Tender site. He contended that this form had been changed after the Tender call was published and submitted that:

- a) The EPPS for the Tender on the e Tenders website still shows the original Financial Bid Form to be available for download and not the changed one;
- b) Professional Meeting and Events had downloaded and filled in the Financial Bid Form with the rest of the Tender Document from the same website;
- c) The Contracting Authority should have removed the original form from the website and not leave it enabled for downloading;
- d) The Appellant should not have been penalized for using the original form;
- e) The amended Financial Bid Form was inserted as the last page of a clarification note and could easily be missed;
- f) The new form was issued after the Tender opening date and therefore it was possible to have bidders who had already submitted their offer using the original form;
- g) An important form like the Financial Bid Form should never have been amended through a clarification note; but the Contracting Authority should have ensured that the original form was replaced so that it would not be possible to download it erroneously.

Dr Caruana Galizia contended that the Appellant was not aware of the change of form and the clarification note did not specifically state that the original form was superseded but that it was revised. Clarification notes were intended to correct some items or give replies to queries and the changed form was neither a correction nor a reply to a question. He also claimed that the change in the Financial Bid Form would not have changed the Appellant's offer in any way and would have remained the same. He insisted that his client's Tender should not have been rejected just for submitting the original form.

Finally Dr Caruana Galizia pointed out that the Recommended Bidder's financial offer had been changed as can be seen from the published schedule and the award letter.

The Chairman pointed out that clarification notes form an intrinsic part of the Tender Document.

Dr Christopher Mizzi on behalf of the Department of Contracts explained that the Evaluation Board are bound to act according to the general rules and regulations. Any amendments are only permissible to Tender Documents through Clarification notes and the publishing of an amended form was a corrigendum since some items had been omitted from the original form. Security features of the e-Tendering system do not allow any changes to be made in the

original Tender Document once it had been published.

Therefore in the present case, the only way to publish the amended form was through a Clarification note and answer 2 of the Clarification note pointed out the fact that a new Financial Bid Form had been attached to the clarification. All bidders in a Tender are obliged to check up to the last minute of the Tender submission period for any changes that have been made. The clarification had been filed more than 6 days before the closing date and therefore was within the legal period. All the other bidders in fact had complied and filled in the new amended form.

Mr David Mizzi, ID No. 15575G, a Procurement Manager with the Department of Contracts under oath said that he had vetted the Tender in question that was published through the EPPS. The Financial Bid Form had to be changed because of a question and therefore was published through a clarification note. An original Tender Document once published can only be changed through a clarification. This was because of safety feature to aid transparency that was contained in the EPPS system. Replying to questions by Dr Peter Caruana Galizia, the witness said that a new Financial Bid Form could have been included in the EPPS and given another name.

Dr Peter Caruana Galizia for the Appellant contended that the method chosen to introduce the new Financial Bid Form was totally misleading. Prospective bidders should not be expected to check daily whether any changes had been made and that an important form would be inserted as the last note of a clarification note. The new form could and should have been included as a new form, properly identified, with the original downloads of the Tender as has been explained by the witness. He contended and reiterated that the new form was not the result of a correction.

Dr Christopher Mizzi for the Department of Contracts said that economic operators have the obligation to examine all information that is published with the Tender Document and the last page is as important as the first page.

At this point the hearing was closed.

This Board,

Having noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection*" dated 25 April 2016 and also through their verbal submissions during the Public Hearing held on 19 May 2016 had objected to the decision taken by the Pertinent Authority, in that:

a) Professional Meeting and Events are contending that their offer was discarded due to the fact that it included the original “*Financial Bid Form*” which was later amended by the Contracting Authority through Clarification Notes, which did not state that the latter was superseded.

In this regard, the Appellant is also maintaining that the change in the “*Financial Bid Form*” did not alter, in any way, their Offer.

Having noted the Contracting Authority’s “*Letter of Reply*” dated 12 May 2016 and also through their verbal submissions during the Public Hearing held on 19 May 2016 in that:

a) Due to the fact that in the original “*Financial Bid Form*” there were items which were missing and that the e-Tendering system does not permit any amendments, the only way possible to correct the “*Original Bid Form*” was through Clarification Notes.

In fact, Answer 2 of the Clarification notes state clearly that “*A new financial bid form has been attached to the clarification*”. In this regard, the Contracting Authority maintains that Professional Meeting and Events were well aware of the amended Financial Bid

Form.

- b) The Contracting Authority is contending that the Appellant submitted the incorrect bid form. All bidders, including the same Appellants knew that the latter form was superseded. In this regard, there was no room for Clarification as this would have otherwise been a rectification, which is not allowed in such a procedure.**

Reached the following conclusions:

- 1. First of All, this Board, as it had done on many occasions, must emphasize the fact that any clarifications to a Tender Document form part of the Tender itself. Clarifications provide the means to include, exclude or correct data which was contained in the original Tender Document.**

In this particular case, enough justifiable evidence was provided by the Contracting Authority that the Appellants, like all the other bidders, were made aware of the change of the Financial Bid Form through the Clarifications dated 24 December 2015 wherein it was specifically stated under Answer 2 that, *“It is to be noted that as per the Financial Bid Form, which has been amended and attached to this*

Clarification Note etc.”, so that the Appellant Company was well informed of such a change in the Financial Bid Form.

In this regard, the Appellant failed to submit the Financial Bid Form, as instructed in the Clarification notes which were sent to the latter 14 days prior to the Closing Date of the Tender.

2. This Board would like to also point out that it is the responsibility of the prospective bidder to ensure that before the submission of his bid, all conditions dictated in the Tender Document and all Clarifications made thereafter are strictly adhered to. The Appellant was responsible to ensure that his documentation was faithful to what was requested until the last minute.

This Board would like to also credibly refer to Article 42 of the General Rules of the Tender Document which states: ***“Clarification Notes will constitute an integral part of the Tender Documentation, and it is the responsibility of the Bidders to visit this website and be aware of the latest information published online prior to submitting their Tender”***.

In this regard, the Appellants completely ignored the instruction

given in the Clarification notes with regards to the changes of the Financial Bid Form.

In view of the above, this Board finds against the Appellant Company. However, due to the fact that the Period between the issue of Clarifications and the Closing Date of the Tender happen to fall within the Christmas Festive Season, which may have affected the Appellant's knowledge of such an amendment, this Board recommends that the deposit paid by the Appellant Company is to be refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

24 May 2016