

PUBLIC CONTRACTS REVIEW BOARD

Case 993 – MSDEC 157/2015 - Tender for Auditing Services to the Eco-Contribution Approving Body, Audit Upon the Procedures of Packaging Waste (Years 2013 & 2014)

The Publication Date of the Call for Tenders was 12 January 2016 whilst the Closing Date for Call of Tenders was 2 February 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 100,000, (€ 50,000 each year)

Three (3) Bidders have submitted offers for this Tender.

On 21 June 2016, Pricewaterhousecoopers filed an Objection against the decision of the Ministry for Sustainable Development, the Environment and Climate Change to award the Tender to KPMG for the price of € 75,000 (Exclusive of VAT) against a deposit of € 500.

On 18 October 2016, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Pricewaterhousecoopers

Mr Joseph Muscat	Representative
Mr George Sammut	Representative
Dr Steve Decesare	Legal Representative

Recommended Bidder – KPMG (Malta)

Mr Jan Grech	Representative
Mr Kevin Mifsud	Representative
Dr Joe Camilleri	Representative

Contracting Authority – Ministry for Sustainable Development, the Environment and Climate Change

Ing Philip Schembri	Chairperson, Evaluation Board
Mr Noel Cini	Secretary, Evaluation Board
Mr Victor Debrincat	Member, Evaluation Board
Ms Junelle Galea	Member, Evaluation Board
Mr Sergio Tartalla	Member, Evaluation Board
Mr Kevin Mercieca	Representative

Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Steve Decesare for Pricewaterhousecoopers opened his submissions by saying that the Objection regarded Clause 17.2 of the Tender Document which was about the Financial Offer. The Tender Document was based on the templates issued by the Department of Contracts. With his client's Letter of Objection, Dr Decesare had annexed a sample of this template whose parts were adjustable and others which were fixed.

The first choice which the Contracting Authority had to make according to the Appellants was between a global unit prices or a fee based contract. The choice fell on the former. Another choice which the Contracting Authority had to make included what documentation had the Bidders give for the financial offer. This documentation had to be specified. The Ministry for Sustainable Development, the Environment and Climate Change chose the Financial Bid Form. There were a number of Financial Bid Forms and the Contracting Authority had to choose which one was applicable for their case.

Dr Decesare referred to Volume 4 Page 69 of their offer wherein Clause 17 had no part which was to be adjustable and they had to be included in every Tender but the Contracting Authority had to choose which form the bidders had to submit their offers. The forms had two options: The global price or the financial breakdown. Clause 17.2 had to be applied whether a price breakdown was requested or not whilst Clause 17.5 asks for rates in the Bills of Quantities which there weren't because there was no Bills of Quantities required.

Dr Decesare submitted copies of previous Tenders including the previous Tender for similar services for which Pricewaterhousecoopers were the incumbents. Dr Decesare concluded by saying that since no breakdown was requested, his clients did not give any breakdown.

Ing Philip Schembri, the Chairman of the Evaluation Board, said that when certain Tenders are issued, we cannot say that there are certain standard clauses which are to stay in the Tender Document even if these do not apply. Ing Schembri referred to Vol 2 Sec 3, Special Conditions where he pointed out that certain articles were skipped. Any articles which were not applicable, these are eliminated from the Tender Document.

Ing Schembri then quoted Clause 17.2 which stated that, "*The Tenderer must provide a breakdown of the overall price in Euro (€). Three decimal points do not exist as currency; therefore such offers cannot be accepted. Offers are to be submitted up to two decimal points*".

The Evaluation Board took their decision following consultations made with the Departmental Contracts Committee, the Department of Contracts and the Office of the Attorney General.

Dr Anthony Cassar, Chairman Public Contracts Review Board, commented that this Board was not going to enter into the merits of interpreting Clause 17.2. Clarifications are made if there was something which was not clear in the documents submitted. The Contracting Authority had every right to request clarifications regarding the price. Obviously, when you talk about a quotation or service Tender, you have to ask for the price but when you ask for a breakdown, you have to know under what items the prices must be allocated. Pricewaterhousecoopers have given a Global Price, continued the Public Contracts Review Board Chairman.

Dr Steve Decesare, the Appellant's Legal Representative, wondered how one was to compare the breakdowns which bidders gave if all of these gave different offers. The Financial Bid Form was chosen by the Contracting Authority who could have asked for a Financial Breakdown if they really wanted it.

If the DCC advice had to be applied, all Tenders would have been wrongly issued since the form chosen with this Tender would have been the form which under Clause 17.2 would have disqualified everybody. This Tender was to be adjudicated under the MEAT conditions, with 60% of the marks being given on technical issues and 40% of the marks given on the price and Dr Decesare was requesting the Public Contracts Review Board to evaluate on those criteria.

Ing Philip Schembri, Chairperson of the Evaluation Board, countered that it was not the Evaluation Board who prepared the Tender Specifications but the latter should have been more clear although if it was contradictory didn't necessary mean that it was incorrect.

The Evaluation Board wanted to know the global price and also requested that the 79 audits, which were differently ranged between easy audits and more difficult ones, had to be made within 10 months. The Evaluation Board also wanted to know how much the Bidders evaluated was needed for an audit to be done.

Dr Anthony Cassar, Chairman Public Contracts Review Board, said that when one requested a Breakdown, one had to specify what was needed. By requesting a breakdown it meant that one had to know how much labour costs, overhead costs and profit was needed to arrive to the global price. The Tender Document was requesting a fee for a service and was requesting a breakdown but one had to specify what was needed in this breakdown like what happens in the audits issued by the National Audit Office for Local Council Audits.

Dr Steve Decesare for Pricewaterhousecoopers said that rulings issued by the European Court of Justice require that any requests for similar Tenders must be precise and unequivocal. The Contracting Authority should have asked for a form which requested a breakdown of prices if they were requesting the latter.

Ing Philip Schembri, Chairperson of the Evaluation Board, argued that the Price Breakdown determined the time for the audit. The Bidder had the choice to submit any Price Breakdown which he felt that he should have sent.

Dr Joseph Camilleri, Legal Representative for KPMG (Malta), said that his clients agreed with the arguments put by the Ministry for the Sustainable Development, the Environment and Climate Change both in their "*Reasoned Letter of Reply*" and in their submissions made during this Public Hearing.

The Public Procurement Regulations say that if a Tender requested certain things, one had to abide with them. The Appellants, continued Dr Camilleri, should have filed a Pre-Contractual Concern if they realised that there were some things in the Tender which were ambiguous prior to submission date.

It was not acceptable that the Objector came up and said that they did not give a Breakdown of the Financial Offer since they assumed that this was not needed as it would go against the Public Procurement Regulations and would incur an injustice with the Bidders who submitted everything and were in line with the requirements.

With regards to the forms, continued Dr Camilleri, the Tender Document stated that if there were any documents associated with the Tender Document; these could have been presented independently of the same.

Dr Steve Decesare for Pricewaterhousecoopers said that his clients were never disqualified for Administrative Compliance. There was no need to seek clarifications as the Tender was clear in its instructions.

Ing Philip Schembri, the Chairperson for the Evaluation Board, concluded by saying that it was the onus of the Bidders to seek clarifications should the need arises.

At this stage, the Public Hearing was closed.

This Board,

Having noted the Appellant’s Objection, in terms of the “*Reasoned Letter of Objection*” dated 21 June 2016 and also their verbal submissions during the Public Hearing held on 18 October 2016 had objected to the decision taken by the Pertinent Authority, in that:

- a) Pricewaterhousecoopers contend that its offer was unfairly discarded due to the fact that they, quite correctly, quoted a “*Global Price*”, which according to the Contracting Authority should have been accompanied by a breakdown of the said quoted price.**

In this regard, the Appellant maintains that by submitting a “*Global Price*”, he has satisfied all the conditions as stated on the “*Bid Form*” of the Tender Document.

Having considered the Contracting Authority’s “*Letter of Reply*” dated 27 June 2016 and also their verbal submissions during the Public Hearing held on 18 October 2016, in that:

- a) The Ministry for Sustainable Development, the Environment and Climate Change maintains that in accordance with Clause 17.2 of the Tender Document, Bidders had to provide a breakdown of the overall price.**

In this particular case, if the Bidder had any doubt about the interpretation of this clause, he should have sought clarifications, prior to the submission of his offer.

Reached the following conclusions:

- 1. This Board would like to justifiably treat this Appeal by addressing two main issues, namely the “*Global Price*” and the “*Financial Bid Form*” as follows:**

- i) Global Price**

From the examination of the Tender Document, the Ministry for Sustainable Development, the Environment and Climate Change is requesting a price for a particular professional service, which in this case is auditing services.

This Board notes that there is no Bill of Quantities which needs to be completed by the Prospective Bidder. The Contracting Authority had also options to choose from either a Global Price, or a Unit Price or a Fee Based Price. However, the Contracting Authority opted to choose a “*Global Price*” quote. In this particular case, Pricewaterhousecoopers quoted, as requested in the Tender Document, a Global Price for the Auditing Services which are to be carried out.

In this regard, this Board opines that, the Appellant adhered to the conditions as laid out in Section 1.3 of the Tender Document, which states that, “*This is a Global Price Contract*”.

ii) Financial Bid Form

This Board notes that Page 54 of the Tender Document lays down the Grid Form to enable the Bidders to quote the Global Price. At

the same time, the Financial bid Form does not indicate how the “*Global Price*” is to be broken.

It is highly logical that the “*Global Price*” quoted does not necessitate a Breakdown as the quoted price is for Professional Services i.e. Auditing Services.

With regards to the Contracting Authority’s Contention that in accordance with Clause 17.2 which stated that “*The Tenderer must provide a breakdown of the overall price etc.*”.

This Board would like to justifiably point out that when and where a Breakdown of the Overall Price is to be submitted, the Tender Document should specify the “*Headings*” or “*Details of Divisions*”, under which the Bidder is bound to submit the Breakdown.

In this particular case, there was no Bill of Quantities to be completed as the latter did not apply to the Tendered Professional Services.

This Board opines that Clause 17.2 was a Standard Clause applicable to Tenders where a breakdown of the Total Price was highly indicative for Evaluation Purposes. In this particular case, once the professional service is delivered, payment thereto is made in accordance with the quoted price.

This Board, apart from the fact that it has not been credibly proven that the Breakdown of the “*Global Price*” was necessary, also opines that the reason given for the rejection of the Appellant’s Offer does not merit a discarding of the latter.

- 2. From the submissions made during the Public Hearing and from the Testimony given by the Contracting Authority, it was confirmed that perhaps the Tender Specifications should have been more direct and precise.**

In this regard, this Board would like to emphasize the fact that the Ministry for Sustainable Development, the Environment and Climate Change is in duty bound to issue specifications in a Tender Document which are clear and without the necessity of having various interpretations or misunderstandings.

In this particular case, this Board is credibly convinced that if the Breakdown of the Global Price was mandatory, the Contracting Authority should have issued a Financial Bid Form showing the detailed section under which a Breakdown is necessary.

At the same instance, the Breakdown should be uniform for all Bidders so that the comparison would be possible. In this regard, the Financial Bid Form showed no breakdown necessary but a global price for the Tendered Services.

In view of the above, this Board finds in favour of Pricewaterhousecoopers and recommends that:

- a) The Appellant's Offer is to be reintegrated in the Evaluation Process;**
- b) The deposit paid by Pricewaterhousecoopers should be fully refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

20 October 2016