

PUBLIC CONTRACTS REVIEW BOARD

Case 1079 – DH 2665/2016 – Tender for the Provision of Blue File Covers for the Primary Health Care Department

The Publication Date of the Call for Tenders was 5 May 2017 whilst the Closing Date for Call of Tenders was 25 May 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 53,000.

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

On 11 August 2017, Associated Marketing Limited filed an Objection against the decision of the Central Procurement and Supplies Unit to award the Tender to Ragonesi & Company Limited for the price of € 35,000 (Exclusive of VAT) against a deposit of € 400.

On 5 September 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard A Matrenza as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Associated Marketing Limited

Mr Joseph Vella	Representative
Mr Mark Vella Bonanno	Representative
Dr Andre' Borg	Legal Representative
Dr Nikol Caruana	Legal Representative

Recommended Bidder – Ragonesi & Company Limited

No representative from Ragonesi & Company Limited has attended for this Public Hearing

Contracting Authority – Central Procurement and Supplies Unit

Mr Joseph Baldacchino	Secretary, Evaluation Board
Mr Noel Apap	Member, Evaluation Board
Mrs Sarah Cutajar	Member, Evaluation Board
Mrs Marthese Deguara	Member, Evaluation Board
Mr Marco Woods	Representative
Dr Stefan Zrinzo Azzopardi	Legal Representative

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

Dr Andre' Borg, the Legal Representative for Associated Marketing Limited opened by saying that, his clients have lodged an Objection against the Central Procurement and Supplies Unit who has decided to disqualify his client's offer, wherein the Tender Document indicated that the unit price was up to three decimal places which is unlike the decision taken by the Evaluation Board which was up to two decimal places.

Dr Borg quoted Clause 1.4 from the Tender Document which said that:

"This is a lump sum contract".

Dr Borg also quoted Clause 3.1 from the same which said:

"This Tender is not divided into lots, and Tenders must bid for the whole of quantities indicated. Tenders will not be accepted for incomplete quantities."

Dr Andre Borg said that the quantity indicated was that of 70,000 Blue File Covers, to be used at the Hospitals.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board pointed out that the quantities can vary on the amount demanded by the Contracting Authority.

Dr Andre Borg, the Appellants' Legal Representative replied that the Tender Document specified that the amount was for the whole quantity of 70,000 and that this could not change for a lower amount. The Tender Document, according to Associated Marketing Limited was conflicting.

With regards to the lump sum, the Appellants quoted the amount of € 34,650 for 70,000 files. This was an important factor for the Adjudication of the Tender due to the fact that this had been issued for the second time, since the first time there were two Bidders who have submitted the same offer. In the second instance, these Bidders were requested to offer a new economical bid.

Dr Andre' Borg then cited different extracts from Case 1013 issued by this Board as differently composed on 17 January 2017 which *inter alia* stated that:

"This Tender is a Global Price Contract. Therefore, the Evaluation Board could only adjudicate on the "overall global quote" and not the "Unit Price".

"The fact that the Financial Bid Form did include a separate column for the unit price is somewhat misleading. However, this does not, in any credible way, alter the basis of the Award Criteria Policies, as vividly denoted in the Tender Document"

"In this regard, this Board does confirm the action taken by the Evaluation Board is asking for a clarification, which in actual fact, was purely a verification of the total global price and also credibly establishes that the "two decimal point" principle was applicable to the global price."

Dr Andre Borg explained that in that particular case, this Board had evaluated the situation in question and that it was a similar one to this Tender in particular, since the discussion then was also about the global price and the unit price.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that the circumstances were different since in the case cited by the Appellants, there was a fixed quantity while in this case there wasn't.

Dr Andre Borg, the Legal Representative for Associated Marketing Limited countered that, there was an issue regarding the quantities, since in this case there was a table with two columns, namely the unit price and the global price. Dr Borg then wondered why there was a unit price for each folder and whether there was a comparison between one folder and another.

The Appellant also questioned, what would happen if the Central Procurement and Supplies Unit decide to order more folders than the amount stipulated since this was not specified in the Tender Document. Another issue was that, there could have been offers with a lower quantity than requested that is of 70,000, the price then had to be rounded up. Associated Marketing Ltd was wondering why the Contracting Authority took such a far-fetched decision.

Dr Borg continued by saying that when it comes to the lump sum, his client's offer was the most economical one and therefore in the strength of consistency, the Public Contracts Review Board should uphold the Objection filed by Associated Marketing Limited and award the Tender to the latter.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit said that this Objection was about the nature of the Contract with which the Central Procurement and Supplies Unit was going to bind itself with the eventual Recommended Bidder. What the Appellants were saying with regards to the lump sum was true but the amounts mentioned in the Tender Documents were indicative.

Dr Zrinzo Azzopardi then proceeded by quoting Article 19 of the Tender Document's Special Conditions which said,

"The quantities indicated are above are only indicative and where necessary may be exceeded. Moreover Government reserves the right not to order the whole quantities shown and would not, by doing so, be held liable to any damages or other costs whatsoever".

The whole point of this Article was that if the figure of 70,000 was initially mentioned, the Central Procurement and Supplies Unit was not obliged to take amounts for that figure since the quantities indicated were indicative so much that the latter has reserved the right not to be responsible for any damages if the whole 70,000 were not taken.

If Associated Marketing Limited had any doubts regarding the matter, then they should have sought a clarification, which was not the case. At the opening stage, there were two Bidders who offered the same amount of covers and when the Contracting Authority requested them to make an economic offer, one Bidder gave a correct offer whilst the other one did not.

Dr Stefan Zrinzo Azzopardi continued by saying that the Unit Price was important because despite the fact that, there was a lump sum and a global sum based on the indicative amount which was worked out in the Financial Bid Form, the Government binds itself with the unit price, hence it was important that the 2 decimal places rule would not be exceeded.

Article 19 has made it clear that the Government was not responsible for any damages. Whilst the lump sum was worked out on an indicative figure, the unit price was important since the values could change. This was the reason why the Evaluation Board has decided to take these steps.

Dr Andre Borg, the Legal Representative for Associated Marketing Limited insisted that this was a lump sum contract.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board noted that both parties agreed that quantities can vary.

Dr Andre Borg, the Legal Representative for Associated Marketing Limited agreed with the latter statement but added that one had to see the nature of the Tender as a lump sum contract in the way with which the latter was presented.

Mr Mark Vella Bonanno, on behalf of Associated Marketing Limited, added that if the sum had to be rounded up to two decimal places it would be misleading since the Electronic Public Procurement System had requested the Bidders to enter only a lump sum that is; that they had to enter only one amount.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board concluded that the matter was whether the Evaluation Board, has conducted their Evaluations in a proper way. Finally, he requested the Central Procurement and Supplies Unit to sign all documents presented to the Public Contracts Review Board for the Public Hearings.

At this stage, the Public Hearing was adjourned to Tuesday 12 September 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

This Board,

Having noted this Objection filed by Associated Marketing Ltd (herein after referred to as the Appellant) on 11 August 2017, refers to the Contentions made by the latter with regards to the award of Tender of

Reference DH 2665/16 listed as Case No 1079 in the records of the Public Contracts Review Board, awarded by the Central Procurement and Supplies Unit (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Andre Borg

Appearing for the Contracting Authority: Dr Stefan Zrinzo Azzopardi

Whereby, the Appellant contends that:

- a) **In accordance with the Tender Dossier, the Award Criteria had to be adjudicated on the cheapest, fully compliant “*Lump Sum*”. In this regard, Associated Marketing Limited maintains that the Evaluation Board did not abide by this condition in their deliberation as their offer was discarded due to the fact that the quoted unit price was not expressed up to two decimal places, yet his quoted “*Lump Sum*”, was the cheapest compliant offer which was correctly expressed up to two decimal places.**

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 18 August 2017 and its verbal submissions during the Public Hearing held on 5 September 2017, in that:

a) **The Central Procurement and Supplies Unit insist that although the Tender stated that this is a “*Lump Sum*” contract, it was made specifically clear in Article 19, “*Period of Execution of Tasks*”, that the quantities of file covers stated in the Tender Document were indicative and not fixed.**

It was also vividly expressed that the Contracting Authority was not bound, in any way, to order the indicative quantities, so that the unit price played an important role in this Tender. In this regard, the unit price quoted by the Appellant was expressed in more than two decimal places, which was not allowable.

This Board, after having considered the merits of this case, arrived at the following conclusions:

- 1. This Board after having examined the relative documentation and heard the submissions made by all parties concerned respectfully opines that the main issues in this Appeal are: The Interpretation of Article 19.1 of the Tender Document and the issue of the “*Lump Sum*” contract. In this respect, these two aspects will be considered as follows:**

i) **Article 19.1 of the Special Conditions**

Article 19.1 of the Special Conditions of the Tender Document state that:

“This Tender is for the supply of 70,000 Blue File Covers. The first consignment of 25,000 File Covers are to be delivered within six (6) to eight (8) calendar weeks from the date of the last signature of the Letter of Acceptance. The Second Consignment of 20,000 File Covers and the Third Consignment of 25,000 File Covers are to be delivered as and when required by the Store Officer.”

At this stage of consideration, this Board opines that the above clearly indicates that there is a fixed quantity to be delivered in tranches specifically quantified by the Authority, so that the maxim that “*This is a lump sum contract*”, duly applies. However the above mentioned article continues by stating that:

“The quantities indicated above are only indicative and where necessary may be exceeded. Moreover, Government reserves the

right not to order the whole quantities shown and would not, by doing so, be held liable to any damages or other costs whatsoever.”

The above last extract from Article 19.1 establishes the fact that the 70,000 quantity of folders is not a fixed quantity and can be varied in whatsoever manner. In this regard, this Board justifiably notes that the Award Criteria was based on the cheapest fully compliant global price which is not a fixed known quantity.

This Board also opines that whenever a Tender’s Award Criteria is based on a “*Lump Sum Contract*”, the Lump Sum for which prospective Bidders submit their offer should represent a known fixed amount. In this particular case, the Global Sum Criteria should not apply. Therefore, the most just and transparent way to adjudicate such a situation is to assess the offers on the unit rate.

In this particular case, it is only the unit price which will remain fixed throughout the execution of the contract, as the global sum can vary.

In this respect, this Board acknowledges the fact that the indicative figures had to be stated so that the prospective Bidder will be in a position to be aware of the magnitude of the Tender, however, if the quantities can be changed during the execution of the Tender, the Award Criteria based on the Lump Sum Principle is not justified.

In this regard, this Board opines that the unit price should prevail in the adjudication of this Tender, hence the unit price submitted by Associated Marketing Limited was justifiably discarded due to the fact that it was expressed in more than two decimal places.

ii) Lump Sum Contract

With regards to this issue, this Board, as had explained earlier on, opines that this particular Tender could not apply the Award Criteria on the basis of a “*Lump Sum Contract*” due to the already considered fact that the Global Price is subject to fluctuations.

However, the Unit Price of each cover is not and it is fixed as per quotations submitted by the Bidders so that the Central Procurement and Supplies Unit can only contract the Bidder to abide by the unit price and not the global price as the latter is yet unknown and the quantities stated in the Tender Document are only indicative as duly expressed in Article 19.1.

In actual fact, the latter does qualify to a certain extent since the validity of the criteria used that of a lump sum can vary in its quantities whilst the unit price cannot. At the same instance, this Board has also considered the fact that, if Associated Marketing Limited, at any particular stager of the Tender Submission, had any particular doubt as to how the unit price is to be expressed, he should have sought clarifications from the Contracting Authority.

In view of the above, this Board:

- a. Finds against Associated Marketing Limited. However due to the circumstance of the Award Criteria duly considered above, it recommends that the deposit paid by the latter should be refunded.**

- b. Upholds the Central Procurement and Supplies Unit’s decision in the award of the Tender. However it recommends that great care should be taken by the Contracting Authority when drafting the Award Criteria in a Tender Document in order to avoid any misinterpretation or misunderstanding by the Prospective Bidder.**
- c. At the same instance, this Board recommends that the Central Procurement and Supplies Unit adopts the appropriate and specific criteria of award in accordance with the Tender Requirements.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Richard A Matrenza
Member

12 September 2017