

PUBLIC CONTRACTS REVIEW BOARD

Case 1272 – CFT 001-1002/18 – Supply of Uniforms with Low level of Toxic Substances

The publication date of the call for tenders was the 14th September 2018 whilst the closing date of the call for tenders was 4th October 2018. The estimated value of the tender (exclusive of VAT) was € 143,000.

On the 17th January 2019 JD Trading Ltd filed an appeal against the Central Procurement and Supplies Unit (CPSU) as the Contracting Authority objecting that their bid was found to be not technically compliant leading to the cancellation of the tender. A deposit of € 720 was paid.

There were three (3) bidders.

On 28th February 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – JD Trading Ltd

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| Dr Cedric Mifsud | Legal Representative |
| Mr John David Farrugia | Representative |

Contracting Authority – Central Procurement and Supplies Unit (CPSU)

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| Dr Marco Woods | Legal Representative |
| Mr Duncan Pulis | Chairperson Evaluation Committee |
| Mr Hristo Ivanov Hristov | Secretary Evaluation Committee |
| Ms Victoria Massalha | Member Evaluation Committee |
| Ms Veronica Montebello | Member Evaluation Committee |
| Ms Cynhtia Scerri | Member Evaluation Committee |

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and invited them to make their submissions.

Dr Cedric Mifsud Legal Representative of JD Trading Ltd said that Appellant had been a supplier of uniforms for a number of years and in this instance his grievance was primarily about procedures followed in the tendering process. The tender requested the submission of uniforms to the set specifications and also the provision of samples. The 10 days allowed to provide these samples were insufficient considering all the details requested - a clarification required samples

of the uniform in the specified colours. Since this is not an off-the-shelf operation it was problematic to manufacture ten uniforms in all ranges of specified colours, so in the time available Appellants provided a sample of the uniform plus colour swatches required for the various uniforms. The screen shot sent on 12th October (received on the 19th) was not detailed enough – indeed there were areas which had been left completely blank. By the 25th October Appellants submitted what had been requested. The rejection letter did not contest either the quality of the material or the colours. As a result of the rejection, cancellation of the tender followed.

Dr Marco Woods Legal Representative of the CPSU said that the cancellation of the tender was not contested by Appellants. If they felt that the 10 day window to submit samples was insufficient they should have sought a pre-contractual remedy. Appellants must have found the request of the 12th October sufficient to enable them to submit samples in time.

Mr Duncan Pulis (380084M) called as a witness by the Board testified on oath that he was the Chairperson of the evaluation committee. He confirmed that the clarification requested by the Contracting Authority was sent after the date of submission of the tender and that the Authority had only requested samples from the cheapest bidder. It was at that stage that the Authority decided to cancel the entire procurement process under Section 18. The tender documents specify that samples of all styles were required, and in this regard the Appellant had failed to provide all the styles.

Questioned by Dr Mifsud witness agreed that the letter of rejection did not raise the question of styles.

The Chairman pointed out that the specific reason given in the rejection letter was the uniform colour when there was obviously, according to the witness, another reason. He also mentioned that when Section 18 is applied there has to be a justifiable reason to support its use.

Dr Woods re-iterated that if Appellants felt that ten days were insufficient to submit samples they should have sought a remedy before bidding.

Mr Pulis continuing his testimony stated that it was intended to re-issue the tender and the specifications would be different.

Ms Kathlene Cassar (520587M) called as a witness by the Contracting Authority testified on oath that she was an Assistant Director in the Health Department, and was responsible for drawing up the specifications in the tender. She was aware of the cancellation of the current tender and that it will be re-issued with different specifications. According to the witness the end-users requested a better quality fabric with different specifications to the uniforms. The end-users had not tried the uniforms specified in the current tender.

Dr Mifsud said that his clients had provided what was possible in the short time allowed to them and they had followed the procedure in previous tenders – which was accepted as standard

practice. The appeal was based on the question of the colour not on styles and the reasons for invoking article 18 as justification for cancellation has to be stated.

Dr Woods said that the pre-contractual remedy is enshrined in the Public Procurement Regulations and should have been availed of. It was clearly indicated that full samples were required. Regarding the cancellation of the present tender by the Contracting Authority witness had made it very clear that the reason that it was withdrawn was due to Health and Safety reasons.

The Chairman thanked the parties for their submissions and declared the hearing closed

This Board,

having noted this Objection filed by JD Trading Limited (herein after also referred to as the Appellants) on 17 January 2019 refers to the claims made by the same Appellants with regard to the cancellation of the Tender of reference CFT 001-1002/18 listed as Case No 1272 in the records of the Public Contracts Review Board, issued by the Central Procurement and Supplies Unit (herein after referred to as the Contracting Authority).

Appearing for the Appellants: Dr Cedric Mifsud

Appearing for the Contracting Authority: Dr Marco Woods

Whereby, the Appellants contend that:

- a) their main Objection refers to the fact that their samples were not of the colours as duly stipulated in the Tender Document. In this regard, the Appellants maintain that, since these items have to be manufactured,**

and the Contracting Authority gave a very limited period for submissions of samples, the Appellants submitted a full sample of the uniform together with colour swatches of the colours requested and in this respect, JD Trading Limited insist that their offer was unfairly rejected by the Contracting Authority.

This Board has also noted the Contracting Authority's '*Reasoned Letter of Reply*' dated 25 January 2019 and also its verbal submissions during the hearing held on 28 February 2019 in that:

- a) the Central Procurement and Supplies Unit contend that if the Appellants felt that the period for the submission of samples was too short, they had the remedy to contest such an issue, the latter of which was not contested. The Contracting Authority also confirmed that a new Tender for the same Procurement is being issued having different specifications, hence cancelling the present Tender.**

This same Board also noted the testimony of the following witnesses, namely:

- 1. Mr Duncan Pulis, who was duly summoned by the Public Contracts Review Board;**
- 2. Ms Kathlene Cassar, who was duly summoned by the Central Procurement and Supplies Unit.**

This Board, having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the witness duly summoned, opines that the issue that merits consideration is JD Trading Limited's submission of samples.

- 1. First and foremost, this Board would point out that the reason given by the Contracting Authority, in their "*Letter of Rejection*" dated 4 January 2019, leaves much to be desired in that, although the reason so given refers to the Appellants' offer default, it does not specify clearly the real cause of deficiency in their offer;**
- 2. From the submissions made during the Public Hearing, it immediately transpired that the reason why JD Trading Limited could not possibly supply the samples as duly dictated in the Tender Document, was due to**

the short period stipulated in the Tender, to supply the same within a period of ten days. This Board acknowledges the fact that, the samples as requested, could not be provided “*off the shelf*” but had to be processed to provide the necessary coloured samples;

3. At the same instance, this Board is justifiably conscious of the fact that, the Appellants were aware of what was being requested by the Contracting Authority and what the process consisted of in supplying the samples within the stipulated period. JD Trading Limited had the remedy to clarify or request for remedies in this regard, prior to the submission of their offer. In this respect, this Board notes that the appellants failed to avail themselves of such remedies. The latter of which are stipulated within the Public Procurement Regulations to afford the opportunity to any prospective Bidder to voice his concern upon any particular item or condition duly specified in the Tender Document, prior to the submission of his offer;

4. This Board would respectfully point out that the Central Procurement and Supplies Unit has the right to impose and dictate conditions in a Tender Document, to enable them to achieve its objectives in procuring

the product as duly requested. In this regard, the Contracting Authority was not informed by the Appellants that the length of the period for the submission of the samples was too short. On the contrary, the Appellants' submitted their offer which clearly implies that they had accepted all the conditions as duly stipulated in the Tender Document;

5. In conclusion, this Board opines that,

- i) the Central Procurement and Supplies Unit had the right to impose the submission of samples in the stipulated format;**

- ii) JD Trading Limited's claim that the period for the submission of samples as required, could have been given due concern through a call for remedies, the latter of which was not availed of;**

- iii) since this Board was informed that a new Tender with different specifications will be issued, the Contracting Authority has no other options but to cancel the Tender.**

In view of the above, this Board,

- i) upholds the decision taken by the Central Procurement and Supplies Unit to cancel the Tender;**

- ii) directs that due consideration should be given by the Contracting Authority, regarding the period which will be allowed for the submission of samples;**

- iii) due to the fact that the new Tender to be issued will stipulate different technical specifications, directs that the deposit paid by the Appellants is to be fully refunded.**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

12th March 2019