

PUBLIC CONTRACTS REVIEW BOARD

Case 1294 – CFT 023-1253/18 – Tender for the Supply of Snacks, Hot and Cold Drinks and Leasing of Dispensing Machines

The publication date of the call for tenders was the 7th December 2018 whilst the closing date of the call for tenders was 7th January 2019. The estimated value of the tender (exclusive of VAT) was € 140,000.

On the 4th March 2019, Multivend Services Ltd filed an appeal against the Central Procurement and Supplies Unit as Contracting Authority objecting that their bid was rejected as their offer exceeded the available budget. A deposit of € 700 was paid.

There were three (3) bidders.

On 9th April 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard A Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Multivend Services Ltd

Dr Maurice Meli	Legal Representative
Mr Adrian Gomez Blanco	Representative
Mr Mark Sciberras	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Mr Paul Mercieca	Chairperson Evaluation Board
Mr Ikram Abdel Wadood	Secretary Evaluation Board
Mr Alexander Lautier	Member Evaluation Board
Mr Antoine Pace	Member Evaluation Board
Mr Edwin Casha	Member Evaluation Board

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and invited submissions.

Dr Maurice Meli Legal Representative of Multivend Services Ltd said that the Appellants' bid was the cheapest; however he had received a note that the tender was cancelled as his offer exceeded the budget. The budget figure was neither stated nor identified anywhere in the tender documents.

The cancellation puts Appellants at a disadvantage as it was not feasible for him to re-bid once the tender was re-issued as his prices were now publicly known and his business model can be replicated. Under the circumstances Appellants expected the Contracting Authority to discuss a negotiated procedure with them.

Dr Marco Woods Legal Representative of the Central Procurement and Supplies Unit stated that Appellants had not won the tender as it was over budget, which latter figure was never published in the tender. This was a departmental tender which limits the budget figure, and all three bids were in excess of that figure. Since all bid offers had been published Appellants were not at a disadvantage as all bidders were in the same boat. He referred to General Rule 18(d) which determined cancellations where bids exceeded the financial resources.

The Chairman said that the rules about the publishing of budget figures had changed and the norm was not to publish them. The Contracting Authority was perfectly entitled to cancel a tender.

Dr Meli said that Clause 9 of the tender document states that the criterion for award was the price, with no budget limit stated. The publishing of prices now opens the competition to others who did not bid before which makes it more difficult to understand why the Authority had not resorted to a negotiated procedure.

Mr Paul Mercieca (2470G) called as a witness by the Board testified on oath that he was the Chairperson of the Evaluation Committee the members of which were aware of the budget limitations. They had evaluated according to the electronic process for tenders, and although the Appellants' bid was compliant it was € 14,000 over budget. The Committee had not considered a negotiated procedure as this only applied in the case of tenders issued by the Department of Contracts.

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

This Board,

having noted this Objection filed by Multivend Services Limited (herein after referred to as the Appellants) on 4 March 2019, refers to the claims made by the same Appellants with regard to the Tender of Reference CFT 023-1253/18 listed as Case No 1294 in the records of the Public Contracts Review Board and

issued by the Central Procurement and Supplies Unit (herein after referred to as the Contracting Authority).

Appearing for the Appellants: Dr Maurice Meli

Appearing for the Contracting Authority: Dr Marco Woods

Whereby, the Appellants contend that:

- a) their main Objection refers to the fact that the Tender was cancelled, allegedly due to the simple reason that the offers were above the expected value, yet, at the same time, the Appellants' offer was made public, so that, it was impractical for them to re-bid. In this respect, the Appellants maintain that, in such a situation, the Contracting Authority should have adopted a negotiated procedure.**

This Board also noted the Contracting Authority's 'Letter of Reply' dated 8 March 2019 and its verbal submissions during the hearing held on 9 April 2019 in that:

- a) the Central Procurement and Supplies Unit insists that although the Appellants' offer was compliant, the financial offer exceeded the Authority's budget for this project. At the same instance, the Contracting Authority maintains that it has the right to cancel the Tender**

as per section 18 (d) of the General Rules Governing Tenders and, in this respect, it had acted accordingly.

This same Board also noted the testimony of the witness namely Mr Paul Mercieca, Chairperson, Evaluation Committee who was duly summoned by the Public Contracts Review Board.

This Board, after 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 the reason for the cancellation of the Tender.

1. First and foremost, this Board would respectfully refer to the circumstances when and where the Contracting Authority can cancel a Tender and, in this regard, would refer to Article 18 of the General Rules Governing Tenders as follows:

“Cancellation may occur where;

- a) The tender procedure has been unsuccessful, namely where no qualitatively or financially worthwhile tender has been received or there has been no response at all;*
- b) The economic or technical parameters of the project have been fundamentally altered;*
- c) Exceptional circumstances or force majeure render normal performance of the project impossible;*
- d) All technically compliant tenders exceed the financial resources available;*
- e) There have been irregularities in the procedure, in particular where these have prevented fair competition;*

f) The duration of the evaluation has exceeded the stipulated time limit in clause 8.”

- 2. In this particular case, the Authority’s budget was € 140,000 and all the three compliant offers exceeded the Budget. One has to bear in mind that, the Appellants’ offer which was the cheapest, exceeded the Budget by € 14,758 and in this regard, the Contracting Authority had no other option but to cancel the Tender due to the simple fact that there was no financially worthwhile bid that the Evaluation Committee could choose for the award of the Tender.**

- 3. With regards to the Appellants’ claim that their offer was the recommended bid, this Board would point out that, the Appellants’ offer was never deemed to be the recommended Bid for award. The fact that the Appellants’ offer was the cheapest does not mean that the same offer was recommended for award.**

- 4. With regards to Appellants’ claim that, since their offer was made public, they are at a disadvantage to submit another offer, this Board would respectfully point out that all the offers submitted were published so that, a level playing field has been maintained by the Authority;**

5. With regards to the Appellants' contention that the Authority should have applied a negotiated procedure, this Board would also point out that this Tender was a departmental Tender so that a negotiated procedure within this framework could not be applied.

In conclusion, this Board opines that:

- a) the Contracting Authority had the right to cancel the Tender as there existed a valid reason and such cancellation was made in accordance with Article 18 of the General Rules Governing Tenders;**
- b) since all the offers received by the Authority, exceeded the latter's budget, there was no other option but to cancel the Tender;**
- c) since this was a departmental Tender, the Contracting Authority could not adopt a negotiated procedure;**
- d) the publication of all the offers, does not in any way, place the Appellants' bid at a disadvantage.**

In view of the above, this Board,

- i) does not uphold the contentions made by Multivend Services Limited;**
- ii) upholds the decision taken by the Central Procurement and Supplies Unit in the cancellation of the Tender;**

**iii) directs that an amount of two hundred euro (€ 200) is to be retained from
the deposit paid by the Appellants, to cover the costs of this Appeal.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Richard A Matrenza
Member

18th April 2019