

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1402 – TM036/2019 – Tender for the Supply and Delivery of Network Switches and Small Form-Factor Pluggable Modules**

The publication date of the tender was the 26<sup>th</sup> June 2019 whilst the closing date was the 18<sup>th</sup> July 2019. The estimated value of the tender (exclusive of VAT) was € 140,000

On the 19<sup>th</sup> November 2019 SICT (Malta) Ltd filed an appeal against Transport Malta as the Contracting Authority on the grounds that their bid was administratively non-compliant and that the tender had been cancelled. A deposit of € 700 was paid.

There were five (5) bidders.

On 12<sup>th</sup> December 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – SICT (Malta) Ltd**

Dr Christopher Chircop	Legal Representative
Mr Justin Fenech	Representative

#### **Contracting Authority – Transport Malta**

Dr Shageryar Ghaznavi	Legal Representative
Mr Chris Gravino	Chairperson Evaluation Committee
Mr Norbert Grech	Member Evaluation Committee
Mr Roderick Parascandalo	Representative
Mr Keith Genovese	Representative
Ms Ethel Demicoli	Representative

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

Dr Christopher Chircop Legal Representative of SICT (Malta) Ltd said that Appellants' offer was the cheapest. The evaluation committee had sought clarifications to which replies were submitted within the stipulated time. The Contracting Authority claimed that the reply to the clarification was not received in time and the tender had been subsequently cancelled as it referred to a product

by its brand name. This is not correct as in page 5 of the tender it is stated that equivalent standards would be accepted.

Dr Shageryar Ghaznavi Legal Representative of Transport Malta said that the Authority concedes the point that the reply was received in time. However the clarification note requested the submission of a power of attorney and the rectification of bidders' name, the former of which was received but the latter point was never replied to. The tender was submitted in the name of S.I.C.T.(Malta) Ltd but the appeal was in the name of Arkafort. The request to clarify this anomaly was not replied to. It was on the suggestion of the Departmental Contracts Committee that the tender was cancelled due to the use of a brand name. The use of the word 'equivalent' in the context mentioned referred to standards not brands.

Mr Justin Fenech Representative of SICT (Malta) Ltd said that Arkafort and SICT were one and the same company – there had merely been a change of name.

Dr Chircop said that the EPPS documents do not allow change of name but a hand written document submitted later showed the new company name. The clarification was not replied to as Appellant was of the view that details submitted were correct since it was one and the same company.

Mr Chris Gravino (316176M0 called as a witness by the Public Contracts Review Board testified on oath that he was the Chairperson of the evaluation committee. He stated that two clarifications were requested by the committee – to submit the power of attorney and to rectify the company's name. The power of attorney had been received but nothing else, and the committee had no option but to reject the bid.

Dr Ghaznavi said that at the time of the bid no company existed by the name of SICT and his client had acted in good faith.

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

End of Minutes

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## **Decision**

**This Board,**

**having noted this objection filed by S.I.C.T. (Malta) Ltd (herein after referred to as the Appellants) on 19 November 2019, refers to the claims made by the**

**same Appellants with regard to the tender of reference TM 0396/2019 listed as case No. 1402 in the records of the Public Contracts Review Board.**

**Appearing for the Appellants: Dr Christopher Chircop**

**Appearing for the Contracting Authority: Dr Shageryar Ghaznavi**

**Whereby, the Appellants contend that:**

- a) Their offer was deemed as administratively non-compliant by the Authority and in this respect, Appellants maintain that they had submitted all the requested information together with replies to the clarification notes.**

**This Board also noted the Contracting Authority's 'Letter of Reply' dated 27 November 2019 and its verbal submissions during the hearing held on 12 December 2019, in that:**

- a) The Authority insists that, although the replies to the rectification notes were received within the stipulated period, Appellants failed to submit details of tenderer as duly requested in the clarification note which had a**

**deadline of 9 September 2019. In this respect, the Authority had no other option but to deem Appellants' offer as administratively non-compliant.**

**This same Board also noted the testimony of the witness namely:**

**Mr Chris Gravino 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 non-submission of the reply to the rectification request by the Authority relating to the name and details of the tenderer.**

- 1. This Board would respectfully refer to the rectification request dated 4 September 2019, wherein Appellants were requested the following:**

*“The Evaluation Committee noted the following shortcomings with regard to your submission:*

*You are kindly requested to submit power of attorney form duly filled in and signed. Kindly also rectify details of bidder form which was already submitted on another economic operator.*

*In terms of Article 7.1 of the Instructions to Tenderers, you are hereby being given the opportunity to rectify these shortcomings within five (5) working days of notification that is 10th September 2019 at 16:00 hrs.”*

**Following such a request, Appellants submitted the power of attorney but failed to rectify the details or give an explanation as to why the tender was denoted as S.I.C.T. (Malta) Ltd in their original submission, whilst the name of Arkafort Ltd emerged.**

- 2. This Board notes that, quite appropriately, the Evaluation Committee, gave Appellants the opportunity to rectify and establish the relationship between these two company names. From submissions made by Appellants, this Board was made aware that, there was a change of name of the tendering company but, retaining the same registration number.**
  
- 3. This Board also noted that, the reason for Appellants’ non-reply in this regard, was that since both company names referred to the tenderer, no reply was given. In this respect, this Board would point out that since Appellants were given the opportunity to rectify or explain that there was a change of name, and such a reply was admittedly not submitted to the**

**Authority, the Evaluation Committee had no other option but to deem Appellants' offer as administratively non-compliant.**

- 4. It must be emphasized that the Evaluation Committee can only carry out the evaluation process on the actual submissions of the tenderer. In this particular case, Appellants had the opportunity to rectify such a deficiency, on their part, however, such an opportunity was not availed of by same.**
  
- 5. With regards to the cancellation of the tender, this Board, after having examined the relevant documentation, would point out that, the technical specifications of the tender document denoted the brand name 'Cisco' without the inclusion of the word 'Or equivalent'. At the same instance, this Board (would) noted that, the note in article 1.1 of section 1 of the tender document, refers to standards only and not products, so that this Board upholds the Authority's decision to cancel the tender.**

**In conclusion, this Board opines that:**

- a) **The name of the tenderer viz S.I.C.T. (Malta) Ltd, at submission stage, did not exist.**
- b) **Appellants had the opportunity to inform the Authority of the change of name to Arkafort Ltd but failed to avail themselves of such a remedy.**
- c) **The technical specifications denoted a brand name without the provision of equivalent products, so that the cancellation of the tender, under these circumstances, is justified.**

**In view of the above, this Board,**

- i. does not uphold Appellants' contentions,**
- ii. upholds the Contracting Authority's decision to cancel the tender,**
- iii. directs that the deposit paid by Appellants should not be reimbursed.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*18 December 2019*