

PUBLIC CONTRACTS REVIEW BOARD

Case 1410 – T045/19 – Framework for the Provision of Wireless Equipment, NAC Tool and Services.

The tender was published on the 18th July 2019 and the deadline for submissions was the 12th September 2019. The estimated value of the tender (exclusive of VAT) was € 1,865,000.00.

On the 12th December 2019 Computime Limited filed an appeal against Malta Information Technology Agency as the Contracting Authority against the disqualification of its tender because it failed to submit a revised Fees Schedule and thus was financially non-compliant. A deposit of € 9325.00 was paid.

There was one (1) bidder.

On the 7th January 2020 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 – COMPUTIME LIMITED

Mr Andrew Borg	Representative
Mr Neil Bianco	Representative
Mr Norman Cutajar	Representative
Mr Jeffrey Sultana	Representative.
Mr Stephen Vella	Representative.
Dr Steve Decesare	Legal Representative
Dr Krista Ellul	Legal Representative

Contracting Authority – MALTA INFORMATION TECHNOLOGY AGENCY

Ms Rosalynn Muscat	Chairperson Evaluation Board
Mr Chris Gatt	Member Evaluation Board
Mr Alan Brincat	Member Evaluation Board
Mr Ramon Mangion	Member Evaluation Board
Ms Claire Dimech	Member Evaluation Board
Mr Robert Grizti	Representative
Mr Robert Galea	Representative
Dr Pauline Debono	Legal Representative
Dr Danielle Mercieca	Legal representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and invited submissions from the appellants' representative.

Dr Steve Decesare for the appellants before hearing witnesses stated that he wanted to make it clear that appellants were not claiming that the contracting authority had malicious intent but the matter is about whether a clarification could have been made. He then asked that someone from the evaluators who was technically cognizant to testify.

Mr Ramon Mangion, ID No. 487980M, a member of the evaluation committee, called to testify by the appellants, gave his testimony under oath. He stated that in the present tender he was involved both in the financial and the technical assessment. When asked to elaborate on the Services aspect of the tender he said that these could be split into two – consultancy and training as well as support and maintenance. These latter two were also twofold – those provided locally and those provided by the manufacturer. He confirmed that Schedule F was part of the tender as published. During evaluation the committee considered both the administrative and technical requirements. Computime had accepted and confirmed a list of mandatory requirements and accepted to provide support and maintenance. The Fees Schedule had been changed because of a clarification question. If it had not been changed there would not have been local support and maintenance. The revised Fees Schedule included the support and maintenance as a line item. If a bidder submitted a schedule where he put down zero as a cost for local support and maintenance, this offer would have been valid as it would have been deemed free of charge. Witness confirmed that for the line item specific to manufacture support and maintenance appellants indicated zero and such zero indication would be valid. Any value indicated that bidder committed themselves to providing the service immaterial of the cost.

Mr Andrew Borg ID No. 513964M testified then. He is the CEO of Computime Limited and was involved in the preparation of the tender. Appellant firm has a long relation with HP Aruba and has the necessary certification. In fact appellants are the only one which is so certified. In the present tender Schedule F regulated maintenance as published by the contracting authority.[??] Appendix A of Schedule F lists the services required from both the manufacturer and from the bidder. Under the Fees schedule appellants costed the local support and maintenance. When submitting the tender through the EPPS appellants filled in the check box that states that the bidder is complying with and accepts all the conditions. This clearly included the local and manufacturer services.

In the computation of appellants' costs (1.7 million Euro) the portion pertaining to the manufacturer was not negligible. Witness confirmed that their offer included both the manufacturer and the local costings since that was what was required in the tender document. The local support and maintenance and the manufacturer support and maintenance were factored in some other line items and not in a specific line item. Appellants offered a package deal.

Cross Examination by Dr Danielle Mercieca: Appellants followed the tender proceedings and monitored them. However this was apparently not enough because the clarification about Schedule F was missed. He stated that no one of his colleagues remembers requesting the said clarification number 29. The clarification was missed. Through an oversight appellant missed filling up the revised Schedule F but the cost of services was included in the main item. Witness confirmed that the workings that were being shown to the Board alone were prepared before the submission of the tender.

Dr Steve Decesare on behalf of the appellants presented to the Board reference decisions mentioned in the letter of objection. He stated that the facts were that following a clarification, the Fees Schedule form in the original tender was revised and erroneously appellants filled the original form instead of the new one. The latter comprised line items that were not in the original. He cited advice by the Attorney General. He contended that appellants had included all the costs in the tender offer.

Dr Danielle Mercieca for the contracting authority contended that most of the decisions cited dealt with technical specifications. Matters when dealing with financial aspects are more strict and changes are not normally accepted. In the present case the change was to Fees Schedule and no change in such forms was admissible. Any change would disqualify the bid.

Dr Decesare contended that no change was made since zero submission was admissible. This meant that appellant's bid was binding and could not be changed later on. He did not agree with what the contracting authority stated in its reply – that the line entries in the revised Schedule were essential for it to get the total cost of procurement. The cost of procurement was included in the original form. It was only the fees schedule that was changed. Appellants did not change the fees schedule but filled the wrong form. He insists that appellants are not trying to change the financial offer and the Chairman was shown the workings. The amount for services is immaterial since it was included in the global amount, and this latter could not be changed.

Here Dr Decesare referred to the Tideland case paragraph 37 and Case E195/08.

The Chairman asked Mr Grixti the importance of knowing the local support and maintenance costs.

Mr Grixti explained that the question was raised by a clarification request but it was important when working the costings to establish the local or manufactured support.

Dr Danielle Mercieca pointed out that even the invoicing for local and manufacturer costs was different.

Dr Steve Decesare contended that appellants' offer should not have been discarded since there was only one offer, it was below budget and there were no other bidders who could have been

prejudiced had a clarification been requested from appellants. The tender had asked that all costs be included. The revised form had not been published and there were no others who would be prejudiced. The bidder could offer zero for support and maintenance. Finally he cited Case 122 decided by this Board.

Dr Danielle Mercieca on behalf of the contracting authority cited Archus case C131/16. Paragraph 33 obliges the contracting authority to abide with the clarifications it had issued. The Evaluation Board could not have asked for clarification since this would have changed the financial offer.

Dr Steve Decesare insisted that the tender document had asked for the whole price for a period of five years and local support and maintenance was included.

Principles of Procurement to stick to the tender requirements. The clarification requested local support fees and during evaluation, if these were not supplied meant that the offer had to be disqualified. There was no clerical error.

The Chairman thanked the parties and the hearing was closed.

End of Minutes

Decision

This Board,

having noted this objection filed by Computime Limited (hereinafter referred to as the Appellants) on 12 December 2019, refers to the claims made by the same Appellants with regard to the tender of reference T 045/19 listed as case No. 1410 in the records of the Public Contracts Review Board awarded by Malta Information Technology Agency (herein after referred to as the Contracting Authority).

Appearing for the Appellants: Dr Steve Decesare

Appearing for the Contracting Authority: Dr Danielle Mercieca

Dr Pauline Debono

Whereby, the Appellants contend that:

- a) Although, through an oversight, they failed to submit the revised ‘Schedule F’ pertaining to the financial offer, said Appellants maintain that they had included the cost of local and manufacturer’s support in their global financial price. At the same instance, they maintain that the Evaluation Committee, under such a circumstance, should have sought clarifications prior to discarding their offer.**

- b) Appellants also insist that the global price quoted in their offer would not have changed through submitting a further breakdown of the cost of support in maintenance, in the revised ‘Schedule F’.**

This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 18 December 2019 and its verbal submissions during the hearing held on 7 January 2020, in that:

a) The Authority contends that the revised schedule F was mandatory, and Appellants failed to submit same, so that the Evaluation Committee had no other option but to deem Appellants' offer as financially non-compliant. At the same instance, the Authority insists that the breakdown of support costs was important as the invoicing for local and manufacturer's cost of support was to be effected separately.

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

Mr Ramon Mangion duly summoned by Computime Limited

Mr Andrew Borg duly summoned by Computime Limited

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony of the witnesses duly summoned, opines that the issue that merits consideration is the non-submission of the revised schedule F, by Appellants.

- 1. This Board would respectfully refer to clarification note number 29, wherein the issue of maintenance was raised, as follows:**

"Clarification Number 29

Date Published 20/08/19

Title of Request Support Services

Question

The cost schedule mention “Annual Cost of 24x7 – 4 Hours Advance Replacement yearly Manufacturer’s Maintenance”, but the sample contract has various references for services to be delivered by the contractor NOT the manufacturer – like Schedule F 3.2 Health checks, 3.0 Maintenance services – b) local support.... F) technical advise.... etc... there is a cost associated with such local support services, so we need to confirm this is so, and where in the Fees schedule this should go, as the initial description is misleading - Annual Cost of 24x7 – 4 Hours Advance Replacement yearly Manufacturer’s Maintenance-

File Associated to Question : <No Attachment Exists>

Answer

The local maintenance and support is being included in the revised Fees Schedule. The revised Fees Schedule is found under the CfT Documents (named T045_19-Document A-”

Through the above-mentioned clarification, the Authority clearly indicated that, the tenderer had to submit the revised ‘Schedule F’ wherein the cost of maintenance was to distinguish between local and manufacturer’s cost of support. Apart from clarifying the issue of costs

of support, this Board was also made aware that such segregation was also necessary for separate invoicing purposes.

- 2. This Board notes that the revised ‘Schedule F’, with particular reference to items 5 and 6, clearly denoted the necessity to indicate local support costs and manufacturer’s cost under a separate tabulation whereby the Authority would be in a position to establish these costs on their own merits and from the submissions made, this Board was made aware that such a segregation was not capriciously stipulated.**

- 3. This Board notes that Appellants acknowledge the fact that they did not submit the revised ‘Schedule F’, which represented the financial offer. At the same instance, one has to appreciate that clarifications form an integral part of the tender document so that non-submission of the revised schedule amounted to missing documentation from Appellants end, which cannot be rectified.**

- 4. This Board confirms that Appellants, in their costing exercise, had included the support costs both from local and manufacturer’s end, however, the tender document, through a clarification note, stipulated**

that such costs be shown separately, and Appellants failed to provide such information.

5. With regard to Appellants' contention in that, their offer should not have been discarded since there was only one offer and through a clarification, no preferential treatment would have been made, this Board would respectfully point out that the Public Procurement Regulations apply in all cases and circumstances, no matter how many offers are submitted to a publicly funded call.

6. As has been emphasized on so many occasions, this Board would point out that, whilst it is the responsibility and obligation of the bidder to abide by the stipulated requirements of the tender document, it is also the duty and obligation of the Evaluation Committee to abide by the principle of self-limitation so as to ensure that equal treatment and level playing field prevail.

7. This Board would point out that, in this particular case, there were no arithmetical mistakes in the financial bid, but Appellants' financial offer did not contain or include the stipulated breakdown of maintenance costs

into local and manufacturers. At the same instance, this Board would point out that the financial offer could not be rectified to comply with the conditions laid out in the revised financial bid. In this regard, Appellants alleged request for a clarification would have amounted to a rectification, which goes against the basic principles of Public Procurement.

8. Pursuant to the foregoing paragraph, this Board would also refer to note 5 of the fees schedule which stipulates that:

“5. Should the tenderer make any changes (including additions, omissions, conditions or qualifications) to the published fees schedule, the tenderer’s offer will be disqualified.”

And regulation 62 (3) of the Public Procurement Regulations which clearly stipulates the following:

“(3) the financial bid cannot be changed with the exception for the correction of evident arithmetic errors as may be allowed in the Procurement Document”.

In conclusion, this Board opines that:

- a) The clarification note issued by the Authority represented a justifiable change in the presentation of the original fees schedule, so that compliance with the revised conditions contained therein was a mandatory requirement.**

- b) Appellants failed to submit the revised schedule as indicated in clarification note No. 29, so that Appellants' offer did not show the stipulated segregated cost of maintenance.**

- c) The financial offer is regulated by Note 3 in that no rectification is allowed.**

- d) Although Appellants' global price did not change, the breakdown of support costs as duly stipulated in the clarification note, was not presented by Appellants.**

- e) The fact that there was only one offer, does not preclude the Evaluation Committee from adhering to principles of self-limitation, transparency and equal treatment.**

In view of the above, this Board,

- i. does not uphold Appellants' contentions,**
- ii. upholds the Contracting Authority's decision in the cancellation of the tender,**
- iii. in view of the fact that the tender is being cancelled, this Board directs that an amount of €8000 from the deposit paid by Appellants, be refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Richard A Matrenza
Member

21 January 2020