

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1414 – CT 2401/2018 – Tender for the Leasing of Energy Efficient Multi-Function Printers (MFPs) for the Ministry for Tourism**

The tender was published on the 10<sup>th</sup> May 2019 and the closing date of the call for tenders was the 11<sup>th</sup> June 2019. The estimated value of the tender (exclusive of VAT) was € 100,000

On the 22<sup>nd</sup> November 2019 Office Group Ltd filed an appeal against the Ministry for Tourism as the Contracting Authority on the grounds that their bid was found to be financially not compliant. A deposit of € 500 was paid.

There were three (3) bidders.

On 14<sup>th</sup> January 2020 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 – Office Group Ltd**

Dr Victoria Cuschieri	Legal Representative
Mr Robert Micallef	Representative
Mr Christian Vassallo Manché	Representative

#### **Contracting Authority – Ministry for Tourism**

Dr Christopher Vella	Legal Representative
Ms Charmaine Portelli	Chairperson Evaluation Committee
Mr Yakof Deguara	Secretary Evaluation Committee
Mr Dalziel Bugeja	Member Evaluation Committee
Ms Mary Rose Briffa	Member Evaluation Committee
Mr Jesmond Sciberras	Member Evaluation Committee
Mr Edwin Ebeyer	Representative

#### **Department of Contracts**

Dr Franco Agius	Legal Representative
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Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Victoria Cuschieri Legal Representative for Office Group Ltd stated that Appellants had submitted a financial bid in the region of € 35,000 and through a clarification the evaluation committee had adjusted this to circa € 35 million. As Appellant did not accept this explanation their bid was judged to be non-compliant, although it was the cheapest. The formula used to calculate prices was embedded in the bid form and could not be altered by bidder. Further, there was an anomaly in the tender documents as on page 4 paragraph 1.2 it was stated that price had to be quoted per copy whereas on page 22 paragraph 5 it stated that the rate had to be quoted per 100 copies. It was re-iterated that the formula had not been changed and if one multiplied the price quoted per 100 copies by the number of copies exactly as shown on the bid form the correct figure was obtained. .

Dr Franco Agius Legal Representative for the Department of Contracts said that most of the facts stated by Appellants representative were correct, but the Contracting Authority did not agree that their bid was the cheapest. The rate quoted per 100 copies was higher than Appellants' claim and the bid form had been changed.

Mr Andrew Cachia (181093M) called as a witness by the Public Contracts Review Board testified on oath that he was the person who drafted the invoice and processed it with the Department of Contracts. He confirmed that on the bid form the price had to be inputted per 100 copies and there was an inbuilt formula embedded to generate the total price. The number of copies requested was in the formula which meant that the bidders only had access to the part where they indicated the price per 100 copies – it was not possible to change anything as the system did not allow it. Witness tabled a copy of the bid form showing the formula for calculation of the price (Doc 1).

Questioned by Dr Cuschieri about the anomaly in the wording of the tender between paragraphs 1.2 and paragraph 5 witness said that the tender intended that prices should be indicated per 100 copies – this was also the case with the bid form.

At this stage the Chairman mentioned that the reason given for the disqualification of Appellants in the clarification note was very restrictive as it prevented any action on their part. Also, the formula though not incorrect was not very clear and could cause confusion.

Ms Charmaine Portelli (436078M) called as a witness by the Public Contracts Review Board testified on oath that she was the Chairperson of the evaluation committee. She said that the financial bid by Appellant was changed and she tabled a document of the form as submitted (Doc 2).

Witness explained that the area highlighted in yellow in Doc 1 was as uploaded in the tender document while the green area highlighted in Doc 2 was as submitted by Appellants – the difference was in the formula used.

Questioned by Dr Cuschieri witness stated that after checking the submissions the committee concluded that the formula had been changed and Appellants should have been disqualified at that stage. Witness said that she did not have available the price submitted by other bidders.

Questioned by Dr Agius witness confirmed that the price submitted by the preferred bidder had been correctly worked out.

The Chairman pointed out that the dispute appeared to be in regard to the formula used, not in the mathematical calculations.

Dr Cuschieri stated that at face value the bid calculation is correct, despite the fact that Appellants were expected to assume certain facts which were not provided. No explanation had been provided for the discrepancy in the wording in different paragraphs of the tender, there was certainly no transparency and the Board should take note of this. Appellant did not change or tamper with the formula, they merely substituted a different excel sheet. Mathematically the Appellants submissions were correct and their bid was the cheapest. She referred to C/A Case 329/2017 (more descriptive technical terms required in tender to avoid misunderstanding) and C/A Case 440/2012 (scrupulous adherence to terms of offer).

Dr Agius said that Appellants' claim was not correct – they had decided to change the formula in the bid form, which went against the terms of the tender which stated that any changes led to disqualification and quoted in support C/A Case 358/18 (tabled as Doc 3). Two remedies were available to Appellants neither one of which had been used, but in any case their offer was the most expensive. The Ballut Blocks (Case 440/2012) dealt with proportionality.

In reply to a question by the Chairman as to why the formula was changed Dr Cuschieri stated that the formula embedded in the bid form was not clear while the number of copies requested was a definite, so a correction was necessary to obtain a mathematically correct result.

Dr Christopher Vella Legal Representative for the Ministry for Tourism said that in clause 4.1 of the tender documents it stated that the tender was a unit price tender – instead Appellants had submitted a global price.

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 Office Group Ltd (hereinafter referred to as the Appellants) on 22 November 2019, refers to the claims made by the same Appellants with regard to the tender of reference CT 2410/2018 listed as case No. 1414 in the records of the Public Contracts Review Board awarded by Ministry for Tourism (herein after referred to as the Contracting Authority).**

**Appearing for the Appellants: Dr Victoria Cuschieri**

**Appearing for the Contracting Authority: Dr Christopher Vella**

**Appearing for the Department of Contracts: Dr Franco Agius**

**Whereby, the Appellants contend that:**

- a) Their financial offer which stood at €35,000 was adjusted by the Authority to read €35,000,000, so that the offer was exceedingly expensive. Appellants, in this regard, maintain that their offer was €195 per 100 copies so that the price per copy was €1.95. At the same instance, Appellants insist that the formula in the financial bid form had not been changed.**

**This Board also noted the Contracting Authority's 'Letter of reply' dated 28 November 2019 and its verbal submissions during the hearing held on 14 January 2020, in that:**

**a) The Authority insists that Appellants changed the formula in the bid form instead of availing themselves of the remedies available prior to the closing date for submission. In this respect, Appellants offer should have been disqualified at the outset.**

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

**Mr Andrew Cachia duly summoned by the Public Contracts Review Board**

**Ms Charmaine Portelli duly summoned by the Public Contracts Review Board**

**This Board has also taken note of the documents submitted by witness**

**Mr Andrew Cachia which consisted of:**

**Document number 1 – copy of bid form showing formula for computation of price.**

**Document number 2 – bid form showing formula applied by Appellants in their submission.**

**Document number 3 – Case 358/18 presented by the Department of Contracts.**

**This Board, after having examined closely 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 issues that merit consideration are two-fold namely:**

- a) Appellants’ submitted bid form and**
- b) Formula applied in the form.**

**Both issues are interrelated so that they will be considered in parallel.**

**a) Appellants’ Submission**

- 1. The financial bid form as drafted and uploaded on the ePPS dictated a fixed quantity of estimated number of copies for 4 years and tenderers were only requested to insert the price per 100 copies, after which the formula would work out the global price of each type of product, as follows:**

<i>Item</i>	<i>Description of Service</i>	<i>Price per 100 Copies Amount in Euro (€)</i>	<i>Estimated number of Copies (For 4 Years)</i>	<i>Price including Taxes, Other duties, &amp; Discounts <u>but</u> Exclusive of VAT Amount in Euro (€)</i>
	<i>Qty.7 Type A – Standard</i>		6	

<i>A</i>	<i>Black &amp; White Copies</i>	<i>6048</i>	<i>€0.00</i>
<i>B</i>	<i>Coloured Copies</i>	<i>8832</i>	<i>€0.00</i>
<i>Qty.1 Type B-Non-Standard</i>			
<i>C</i>	<i>Black &amp; White Copies</i>	<i>1632</i>	<i>€0.00</i>
<i>D</i>	<i>Coloured Copies</i>	<i>1536</i>	<i>€0.00</i>

**2. Appellants submitted the following bid form**

<i>Item</i>	<i>Description of Service</i>	<i>Price per 100 Copies</i> <i>Amount in Euro (€)</i>	<i>Estimated number of Copies</i> <i>(For 4 Years)</i>	<i>Price including Taxes, Other duties, &amp; Discounts but Exclusive of VAT</i> <i>Amount in Euro (€)</i>
	<i>Qty.7 Type A – Standard</i>			
<i>A</i>	<i>Black &amp; White Copies</i>	<i>€195.00</i>	<i>6048</i>	<i>€11,793.60</i>
<i>B</i>	<i>Coloured Copies</i>	<i>€203.00</i>	<i>8832</i>	<i>€11,928.96</i>
	<i>Qty.1 Type B-Non-Standard</i>			
<i>C</i>	<i>Black &amp; White Copies</i>	<i>€181.00</i>	<i>1632</i>	<i>€2,953.92</i>
<i>D</i>	<i>Coloured Copies</i>	<i>€189.00</i>	<i>1536</i>	<i>€2,903.04</i>

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*Grand total including taxes/charges, other duties & discounts but exclusive of VAT (delivered Duty Paid - DDP) carried forward to financial section ,of online tender response format*

€35,579.52

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**Appellants' submission indicated a price of €195 per 100 copies that is €1.95 per copy multiplied by the dictated number of copies of 6048, in the case of black and white copies, so that the total and global price would be €11,793.60 and so on for the other type of copies.**

**3. However, the formula embedded in the global price as uploaded in ePPs had been formulated to be the price per 100 copies multiplied by the dictated number of copies for 4 years. In this respect, this Board would refer to the fact that, Appellants submission was incorrect in that, the price of 100 copies quoted at €195 had to be multiplied by the fixed number of copies, i.e. €195 multiplied by 6048 which results in a global price of €1,179,360 (for black and white copies), hence the request for confirmation of such a quotation from the Authority.**

**4. This Board notes that, in their submission, Appellants changed the formula embedded in the bid form by multiplying the number of stipulated copies by the price of 1 copy and not as duly stipulated a price**

**per 100 copies. In this regard, this Board would point out that the financial bid form cannot be changed in its configuration or form as, all the Appellants had to insert was the price per 100 copies and the rest would be worked out by the formula itself.**

**5. This Board notes that Appellants did not follow the instructions as duly dictated in the tender document when compiling their bid form and in this respect, Appellants, if in doubt, had the remedies to clarify any misunderstanding in the tender document prior to their submission, the latter of which were not availed of by Appellants.**

**6. The formula embedded in the financial bid form was applicable to all the bidders and this Board confirms that same formula was adhered on all the offers on a level playing field and equal treatment, so that the adjudication process resulted in the award of the tender to the cheapest compliant bid.**

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

- a) Appellants did not abide by the instruction given in the tender document in their submission of the financial bid form as uploaded on the ePPS system.**
  
- b) The formula embedded in the financial bid form was applied on all the other competing bids.**
  
- c) Appellants had the opportunities to clarify such a misunderstanding of the financial bid form; however they did not avail themselves of such remedies.**
  
- d) The evaluation process was carried out in a fair, just and transparent manner.**
  
- e) The tender was awarded to the cheapest compliant bid.**

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

- i. does not uphold Appellants' contentions,**
- ii. upholds the Contracting Authority's decision in the award of the tender,**
- iii. directs that the deposit paid by Appellants should not be refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*23 January 2020*