

PUBLIC CONTRACTS APPEALS BOARD

Case No. 205

CT/2713/2009 Advert No CT/A/004/2010

Service Tender for the Provision of Technical Expertise for the Appraisal, Guidance and monitoring of CABs/Financial Feasibility Studies

This call for tenders was published in the Government Gazette on 19 January 2010. The closing date for this call for offers with an estimated value of € 650,000 (excl. VAT) was 2 March 2010.

Two (2) tenderers had submitted their offers

DKM Economic Consultants, CSIL, Mazars Consulting Ltd Consortium filed an objection on the 3 May 2010 after its offer had been adjudicated administratively non-compliant.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Anthony Pavia and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 7 July 2010 to discuss this objection.

Present for the hearing were:

DKM Economic Consultants, CSIL, Mazars Consulting Ltd Consortium (The Consortium)

Dr John L Gauci	Legal Representative
Mr John Lawlor	Representative of DKM Economic Consultants
Mr Alan Craig	Representative of Mazars Consulting Ltd

London Economic Ltd

Dr Edward Firman	Legal Representative
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Planning and Priorities Coordination Division (PPCD) Evaluation Board

Ms Edel Vassallo	Evaluator
Mr Jonathan Vassallo	Evaluator
Mr Ivan Gauci	Secretary

Contact Department

Mr Francis Attard	Director General
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After the Chairman's brief introduction, the appellant Company was invited to explain the motive/s of the objection.

The PCAB, after taking note that none of the interested parties raised any objection, acceded to the appellants' request for the proceedings to be held in the English language so that Mr John Lawlor would be able to follow what was taking place.

Dr John Gauci, representing the 'Consortium', started by quoting the reason for exclusion as communicated by letter issued by the Contracts Department on the 28th April 2010:

"It emerged that the documentation provided was not in accordance with Article 4 of the 'Instructions to Tenders' since the Financial Proposal was submitted in Package Two instead of Package Three."

The PCAB noted that Dr Gauci did not quote the remaining part of the reason for objection which read as follows:

"It is clearly stated in the tender document that the 'financial proposals are to be submitted ONLY in package three and that any infringement to such a rule is to be considered as a breach and will lead to the rejection of the tender'. In view of this the Committee felt that it should not continue any further with the evaluation of this bid."

Dr Gauci declared that his client was very careful to adhere to all the conditions of the tender document. He then referred to the first set of clarifications issued on the 18th of February 2010 and he claimed that eight out of the ten questions were submitted by his client some of which concerned a number of inconsistencies in the tender procedure.

Dr Gauci recollected the PCAB's stand that in the case of any incongruity between the tender document and the law, then the law would prevail. Dr Gauci contended that his client had submitted all that was required according to law which provided as follows:

"Reg. 82 (1)

(b) Package Two: technical specifications including supportive literature, details, designs, samples and any other matter as requested in the tender documents;

and

(c) Package Three: completed price schedules and, or bills of quantities, form of tender, payment terms or other financial arrangements; any covering letter which may provide other pertinent details of a commercial nature."

Dr Gauci insisted that his client did not submit the financial offer in Package 2 but that it was in fact submitted in Package 3, which still had not been opened at that stage.

Dr Gauci then moved on to refer to:

i) Clause 4.2 ‘Technical Offer’ at page 6 of the tender document which stated that:

“The Technical offer must include the following documents:

(b) a signed declaration from each legal entity identified in the tender submission form, using the format attached to the tender submission form”;
and

ii) to para. (3) of the Service Tender Submission Form at page 68 of the tender document which had to be inserted in Package 2:

“(3) Declaration (s) – As part of their tender, each legal entity identified under point 1 of this form, including every consortium partner, must submit a signed declaration using the attached format. [For consortia, the declaration of the Leader must be a signed original but those of the partners may be faxed copies].”

Dr Gauci also referred to page 71 of the tender document which laid out the ‘format of the declaration’ referred to in point (3) of the Service Tender Declaration Form.

The Chairman PCAB drew the attention of the appellant Company’s representative that it was clearly indicated in bold print that this declaration referred to in page 71 had ‘To Be Inserted In Package 3’.

Dr Gauci did not contest the observation made by the Chairman PCAB but insisted that the ‘Format of the Declaration’ found at page 71 had to be submitted as part of the ‘Service Tender Submission Form’ as per paragraph (3) thereof. Dr Gauci argued that the ‘Format of the Declaration’ referred to in page 71 did not constitute the financial offer because the financial offer was in a totally different format as one could see from Annex V: Budget at page 60 of the tender document. Dr Gauci remarked that the only doubt in his client’s mind was whether to submit the ‘Declaration’ as per page 71 also in Package 3, and in fact claimed that his client had submitted this declaration in Package 2 and in Package 3.

Dr Gauci also referred to Clause 4.3 ‘Financial Offer’ at page 8 of the tender document which stated, *inter alia*, that:

“The Financial offer must be presented as an amount in euro and must be submitted using the template for the global-price version of Annex V of part B of this tender dossier (found at page 60).”

The Chairman PCAB remarked that, with regard to the Three Package System, the spirit of the law was that the financial offer had to be submitted in Package 3.

Dr Gauci referred to a document submitted by the Irish firm of solicitors “PHILIP LEE” where, among other things, it advised that:

“We are of the opinion that, in so far as procurement practice in Ireland is concerned, the three package system (whereby the bid bond, technical bid and the financial bid are separate) is not used in the consultancy services sector.”

Dr Gauci argued that, in terms of section 82 (1) (b) of the Public Contracts Regulations, in Package 2 the contracting authority had the right to ask for any document it deemed fit whereas in Package 3 the financial offer had to be broken down into five activities which, he claimed, was distinct from the global price of the offer. Dr Gauci contended that his client’s actions were not inconsistent with the law because his client had only submitted in Package 2 what he had been requested in the tender document whereas what his client submitted in Package 3 still had to be seen when the third envelope was opened.

Mr Anthony Pavia, PCAB member, asked how was it that, as Dr Gauci had indicated earlier on, the appellant Company had sought clarifications on a number of points but it failed to seek a clarification about this issue, i.e. whether tenderers could divulge the price of the offer in Envelope 2. Mr Pavia conceded that there could have been a situation where what was indicated in the tender document was inconsistent with the regulations – where only Package 3 dealt with the financial aspect of the tender - and hence the bidder should have sought a clarification before the submission of the offer.

Dr Gauci reiterated that his client had no doubt that the ‘Service Tender Submission Form’, together with the signed declaration requested at para. (3) therein, had to be inserted in envelope 2 but the only doubt that cropped up was as to whether the declaration had to be inserted also in Envelope 3.

Dr Gauci insisted that the financial proposal consisted of the details indicated in Annex V (page 60), which required more than the global price, and that it was incorrect to allege that his client submitted the financial proposal in package 2 when the said Company only submitted the (global) price of the tender in package 2 as per Tenderer’s Declaration at page 71 of the tender dossier.

The Chairman PCAB declared that the PCAB had always held that the price - call it financial offer or whatever - could not be divulged in Package 2.

Mr John Lawlor, representing the Consortium, the appellants, acknowledged that by the time they realised that there could have been an inconsistency between tender document and the law it was too late to seek a clarification. Mr Lawlor declared that he had followed the instructions of the tender to the best of his ability.

The Chairman PCAB remarked that one was not questioning whether things were done in good faith or not but the PCAB could not overlook the fact that in the ‘Three Package System’ the price had to be divulged only in Package 3 because the relevant regulations are clear that Package 2 was about the technical aspect to the offer.

At that stage Dr Gauci asked the adjudication board what the only other participating tenderer had submitted in this regard.

Ms Edel Vassallo, evaluator of the adjudication board, under oath, gave the following evidence:

- the decisions taken by the adjudication board were unanimous;
- there was no inconsistency in the instructions contained in the tender dossier;
- she was aware of the link between one document and another and pointed out that the forms and declarations being referred to were clearly marked in which envelope each had to be submitted;
- the adjudication board had noted that the bidder had deliberately deleted the instructions and that indicated that the bidder was aware of these instructions;
- the bidder had inserted a note indicating the it was submitting the document in both packages 2 and 3 – the latter still had not been opened;
- the other participating bidder included the ‘Service Tender Submission Form’ (page 68) in Envelope 2 but he did not include the ‘Tenderer’s Declaration’ (page 71) in Envelope 2, which represented the technical package;
- the information, apart from the price, contained in the ‘Tenderer’s Declaration’ (page 71) was available in other sections of the tender submission; and
- para. (3) of the ‘Service Tender Submission Form’ indicated that the ‘*signed declaration*’ had to be submitted ‘*as part of their tender*’ and not as part of Package 2

Dr Gauci reiterated that under clause 4.2 ‘Technical Offer’ at page 6 of the tender document, it is stated that:

“The Technical offer must include the following documents:

(b) a signed declaration from each legal entity identified in the tender submission form, using the format attached to the tender submission form”.

Dr Gauci complained that it appeared to him that his client has been rejected for including the global price in Package 2 whereas the other participating bidder was not rejected for not having submitted the ‘signed declaration’ with his technical offer. Dr Gauci insisted that the other tenderer should have submitted the ‘signed declaration’ in Package 2, even if without divulging the global price.

The Chairman PCAB remarked that it was true that in Clause 4.2 (1) of the instructions at pages 6 and 7 indicated that the technical offer must include (b) ‘a signed declaration’ but it was equally true that the ‘Tenderer’s Declaration’ had clear indications that it had to be submitted in Package 3. He agreed with Ms Vassallo that para. (3) of the ‘Service Tender Submission Form’ did not indicate that the ‘signed declaration’ had to be submitted in Package 2 or 3 but that it had to be submitted ‘as part of their tender’.

Dr Edward Firman, representing London Economics Ltd, pointed out that according to the instructions printed in bold at page 10 of the tender document: Any infringement of these rules (e.g. reference to price in the technical offer) is to be considered a breach of the rules, and will lead to rejection of the tender.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 03.05.2010 and also through their verbal submissions presented during the public hearing held on 07.07.2010, had objected to the decision taken by the General Contracts Committee;
- having taken note of the points raised by the appellants’ legal representative, particularly those relating to (a) the fact that what his client had submitted was according to law, (b) the fact that his client did not submit the financial offer in Package 2 but that it was in fact submitted in Package 3, which had still not been opened at that stage, (c) the fact that the ‘Format of the Declaration’ found at page 71 had to be submitted as part of the ‘Service Tender Submission Form’ as per paragraph (3) thereof, (d) the fact that the appellant Company had submitted this declaration in Package 2 and in Package 3, (e) the fact that his client’s actions were not inconsistent with the law because his client had only submitted in Package 2 what he had been requested in the tender document whereas what his client submitted in Package 3 still had to be seen when the third envelope was opened, (f) the fact that the financial proposal consisted of the details indicated in Annex V (page 60), which required more than the global price, and that it was incorrect to allege that his client submitted the financial proposal in package 2 when the said Company only submitted the (global) price of the tender in package 2 as per Tenderer’s Declaration at page 71 of the tender dossier, (g) the fact that clause 4.2 ‘Technical Offer’ at page 6 of the tender document stated that “*The Technical offer must include the following documents: (b) a signed declaration from each legal entity identified in the tender submission form, using the format attached to the tender submission form*” and (h) the fact that it appeared to him that his client has been rejected for including the global price in Package 2 whereas the other participating bidder was not rejected for not having submitted the ‘signed declaration’ with his technical offer, insisting that the other tenderer should have submitted the ‘signed declaration’ in Package 2, even if without divulging the global price;
- having also taken note of Mr Lawlor’s contention relating to the fact that by the time they realised that there could have been an inconsistency between tender document and the law it was too late to seek a clarification;
- having taken into consideration Ms Vassallo’s evidence, particularly, (a) her claim that there was no inconsistency in the instructions contained in the tender dossier, (b) the fact that she was aware of the link between one document and another pointing out that the forms and declarations being referred to were clearly marked in which envelope each had to be submitted,

(c) her claim that the bidder had deliberately deleted the instructions and that indicated that the bidder was aware of these instructions and (d) para. (3) of the 'Service Tender Submission Form' indicated that the '*signed declaration*' had to be submitted '*as part of their tender*' and not as part of Package 2

reached the following conclusions, namely:

1. The PCAB opines that it was more than clear that the 'Service Tender Declaration Form' had to be 'To Be Inserted In Package 3', so much so that it was indicated in bold print
2. The PCAB also notes that, regardless of what had been stated by appellant Company, a price is part of a financial offer and, as a consequence, and in full consonance with the pertinent Maltese legal provisions, the financial offer had to be submitted in Package 3 in line with normal legal parameters
3. Whilst conceding that, in this particular instance, there could have, seemingly, been a situation where what was indicated in the tender document may have been 'prima facie' inconsistent with the regulations, yet nothing precluded the appellant from drawing the attention of the contracting authority in regard via a simple clarification
4. The PCAB agrees with the Chairperson of the adjudication board's claim that (a) there was no inconsistency in the instructions contained in the tender dossier and (b) para. (3) of the 'Service Tender Submission Form' did not indicate that the 'signed declaration' had to be submitted in Package 2 or 3 but that it had to be submitted 'as part of their tender'
5. The PCAB is further convinced that the appellant Company was fully aware of what it was doing by the fact that, during the preparation of its submission, it had deliberately deleted the instructions clearly indicating that the bidder was aware of these instructions at that moment in time.

As a consequence of (1) to (5) above this Board finds against the appellant Company.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should not be reimbursed.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Carmel J Esposito
Member

16 July 2010