

PUBLIC CONTRACTS REVIEW BOARD

Case No. 373

TM/109/2010

Tender - Satisfaction Surveys – Valletta and Marsaxlokk Main Breakwaters Project

This call for tenders was published in the Government Gazette on 18th February 2011. The closing date for offers was 11th March 2011.

The estimated value of this tender was € 55,460.

Three (3) tenderers submitted their offers.

M Fsadni & Associates filed an objection letter dated 21st September 2011 against the decisions of Transport Malta to disqualify its offer as administratively non-compliant and to recommend the cancellation of the call for tenders.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr Carmel Esposito and Mr Paul Mifsud as members convened a meeting on Friday, 27th January 2012 to discuss this objection.

M Fsadni & Associates

Dr Leslie Cuschieri	Legal Representative
Ms Marika Fsadni	Managing Director

Transport Malta

Dr Joseph Camilleri	Legal Representative
Mr Maurizio Micallef	Representative

Evaluation Board

Mr Victor Battistino	Chairman
Mr Charles Axisa	Member
Mr Jason Bongailas	Member
Ms Elizabeth Markham	Member
Mr Ludwig Xuereb	Secretary



After the Chairman's brief introduction, the appellant firm's representative was invited to explain the motives of the company's objection.


Dr Leslie Cuschieri, legal advisor of M Fsadni & Associates, the appellant firm, remarked that by letter dated 14th September 2011, Transport Malta informed his client that the offer was found to be administratively non-compliant. In a subsequent email dated 16th September 2011 the contracting authority provided the following explanations:-

- *bidder re-typed the Tender Form & omitted some clauses and wording;*
- *clause 22.4 of the tender document states that "The tender will be rejected if it contains any alteration, tampering, addition or deletion to the tender documents not specified in a clarification note issued by the Contracting Authority"; and*
- *all other bidders were either administratively or technically non-compliant, and as such the tender was not awarded. The Contracting Authority i.e. Transport Malta will be re-issuing the same tender in due course.*

1) Tender Form

Dr Cuschieri made the following submissions:-

- i. the tender document provided the 'Tender Form' in PDF format and hence his client, to avoid filling in the form by hand in this time and age, decided to retype the tender form in word format and then filled in the spaces accordingly;
- ii. in retyping the 'Tender Form' his client had omitted certain notes provided in insets, e.g. the notes at 1 and 2 at part A and 1 to 3 at clause 11 of the version provided in the tender document, which were only meant to guide or to inform the tenderer, otherwise the entire content and conditions were retyped, filled in and duly signed;
- iii. his client, represented by Ms Marika Fsadni, did not leave out the material content of the 'Tender Form', namely she did not omit any conditions to, eventually, exonerate herself or the firm she represents or, in any other way, gain any unfair advantage over the other tenderers - in fact she had submitted a similar retyped tender form with other tender submission (TM/103/2010) and Transport Malta did not raise any objection;
- iv. once his client had provided all the information requested of her firm and since, in this case, his client's representative had clearly declared that she was the project leader - assuming 100% responsibility for the project - then one did not expect the contracting authority to be too strict in the application of the provision of clause 22.4 whereby the tender would be rejected for altering or deleting any part of the tender document when, in this case, the omission concerned only footnotes or irrelevant things to this specific case;
- v. clause 22.4 was meant to preclude the tenderer from changing the tender document to avoid being bound by certain conditions or to gain advantage over the other bidders by cheating which was certainly not this case as no material alteration was effected;



vi. if one were to give a strict interpretation, clause 22.4 referred to the 'tender document' which, according to clause 10.1, comprised the following documents, i.e. instructions to tenderers, draft contract, general conditions, special conditions, terms of reference and model financial bid, and therefore, strictly speaking, the 'Tender Form' was not considered as part of the tender document and so, the provisions of clause 22.4 (deleting, altering etc) did not apply in the case of the 'Tender Form';

and

vii. three bidders participated in this tendering process, two of whom had been disqualified for technical shortcomings, whereas his client was disqualified on administrative grounds.

Dr Joseph Camilleri, legal representative of Transport Malta, the contracting authority, submitted that:-

- a. the 'Tender Form' was a very important part of the tendering documentation because by signing it the bidder would bind himself/herself/a firm with the tender conditions;
- b. the 'Tender Form' in question was the standard one provided by the Contracts Department;
- c. contrary to what the appellant firm seemed to imply, the contracting authority did not agree that, in the circumstances, all the requested information was provided by the appellant firm;
- d. with regard to Part 'A' of the 'Tender Form', the appellant firm's representative only filled in the first line of the first table thus leaving out, apart from the notes 1 to 3, the second table which dealt with sub-contracting;
- e. it was correct that the appellant firm's representative had declared that she was submitting the tender in the firm's own right and not as part of a joint venture or consortium, but the second table of Part 'A' of the 'Tender Form' was still relevant to the contracting authority because the bidder had to declare if the firm was going to sub-contract any of the works/services and, if so, to name the sub-contractors and to indicate the extent of such sub-contracting and experience in similar services;
- f. one had to make a clear distinction between being the 'sole bidder' in the tender submission and 'subcontracting' because the sole bidder, although 100% responsible, could resort to sub-contracting and the contracting authority requested an undertaking by the bidder as to whether one intended to sub-contract and, if so, to give the data requested. In this regard the contracting authority was left completely in the dark;
- g. moreover, in retyping the 'Tender Form', the appellant firm mixed up the numbering of the clauses and, as a result, the cross references that were made between the clauses of the 'Tender Form' and those in the rest of the tender



document were all mixed up and made no sense anymore - a case in point was clause 6 of appellant firm's 'Tender Form' (clause 8 in the original) which stated that:

"We accept that we shall be excluded from participating in the award of this tender if compliance certificates in respect to declarations made under clause 7 of this declaration are not submitted by the indicated dates"

when clause 7 was renumbered by the appellant firm as 'clause 5';

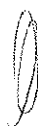
- h. a similar case was clause 10 of the appellant firm's 'Tender Form' (clause 12 in the original);
- i. clause 5 in the original stipulated the tender validity date as 150 days from the final date of submission of tenders whereas clause 2 of the appellant firm's 'Tender Form' referred to "...a period as requested by TM";
- j. in the light of the above, one could appreciate that the changes were not superficial but were significant changes to a very important part of the tender documentation and, as a consequence, the contracting authority was not simply splitting hairs;

and

- k. even if the changes effected to the 'Tender Form' were not material, which was not so in this case, such alterations would render the submission administratively non-compliant as per tender conditions at clause 22.4.

Dr Cuschieri explained that:-

- i. the fact that the appellant firm did not express itself on sub-contracting meant that it was not going to resort to sub-contracting otherwise it would have indicated so and what the contracting authority was objecting to in this regard amounted just to spoon feeding and not essence;
 - ii. the numbering of the retyped 'Tender Form' was, admittedly, not carried out correctly and that care should have been taken by his client in that regard. Nevertheless, from the content and the spirit of the clauses in question, one could have easily become aware to which clause reference was, effectively, being made;
- and
- iii. with regard to the validity period of the tender at clause 4 of the original 'Tender Form', his client was perfectly correct in the firm's declaration that it would abide by the tender validity period as indicated by Transport Malta, meaning 150 days from final date of submission of tenders, but the firm's representative, certainly, did not alter the period requested.



2) Notification of Tender Rejection

Dr Cuschieri stated that if one were to apply legal terms to the letter then he would raise the issue that in the letter of rejection the contracting authority had misled his client with regard to her firm's right to appeal when it, erroneously, quoted Part XIII of LN 296 of 2010, which granted 10 days, whereas that applicable to this case was Reg. 21 of Part II, which granted 5 days within which to lodge the appeal.

Dr Camilleri admitted this shortcoming on the part of Transport Malta. Yet, whilst adding that care would be taken to avoid the recurrence of such an event, the contracting authority's legal advisor pointed out that the appellant firm was not disqualified because the appeal was not lodged according to regulations.

Dr Cuschieri concluded that, considering the nature of the reasons for rejection, one had to question whether it was worthwhile for the evaluation board to be too strict in the legal interpretation of clauses and thus compel the contracting authority to cancel the tender and issue another one.

On his part Dr Camilleri concluded that if the bidder left the sub-contracting part entirely out of the 'Tender Form', the contracting authority should in no way interpret that as an automatic 'no' for an answer but the bidder was expected to make a clear declaration in that specific regard.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant company, in terms of the reasoned letter of objection dated 21st September 2011 and through the verbal submissions made during the hearing held on the 27th January 2012, had objected against the decisions of Transport Malta to disqualify its offer as administratively non-compliant and to recommend the cancellation of the call for tenders.;
- having noted the appellant firm's representatives' claims and observations regarding the fact that (a) by letter dated 14th September 2011, Transport Malta informed the appellant firm that the offer was found to be administratively non-compliant due to the fact that (1) bidder re-typed the Tender Form & omitted some clauses and wording, (2) clause 22.4 of the tender document states that "The tender will be rejected if it contains any alteration, tampering, addition or deletion to the tender documents not specified in a clarification note issued by the Contracting Authority" and (3) all other bidders were either administratively or technically non-compliant, and as such the tender was not awarded, (b) in view of (a) the Contracting Authority i.e. Transport Malta will be re-issuing the same tender in due course, (c) the tender document provided the 'Tender Form' in PDF format and hence the appellant firm, to avoid filling in the form by hand in this time and age, decided to retype the tender form in word format and then filled in the spaces accordingly, (d) in retyping the 'Tender Form' the appellant firm had omitted certain notes provided in insets, e.g. the notes at 1 and 2 at part A and 1 to 3 at clause 11 of the version provided in the tender document, which were only meant to guide or to inform the tenderer, otherwise the entire content and conditions were retyped, filled in and duly signed, (e) the appellant firm, represented by Ms Marika Fsadni, did not leave out the



material content of the 'Tender Form', namely she did not omit any conditions to, eventually, exonerate herself or the firm she represents or, in any other way, gain any unfair advantage over the other tenderers - in fact she had submitted a similar retyped tender form with other tender submission (TM/103/2010) and Transport Malta did not raise any objection, (f) once the appellant firm had provided all the information requested of her firm and since, in this case, the appellant firm's representative had clearly declared that she was the project leader - assuming 100% responsibility for the project - then one did not expect the contracting authority to be too strict in the application of the provision of clause 22.4 whereby the tender would be rejected for altering or deleting any part of the tender document when, in this case, the omission concerned only footnotes or irrelevant things to this specific case, (g) clause 22.4 was meant to preclude the tenderer from changing the tender document to avoid being bound by certain conditions or to gain advantage over the other bidders by cheating which was certainly not this case as no material alteration was effected, (h) if one were to give a strict interpretation, clause 22.4 referred to the 'tender document' which, according to clause 10.1, comprised the following documents, i.e. instructions to tenderers, draft contract, general conditions, special conditions, terms of reference and model financial bid, and therefore, strictly speaking, the 'Tender Form' was not considered as part of the tender document and so, the provisions of clause 22.4 (deleting, altering etc) did not apply in the case of the 'Tender Form', (i) the fact that the appellant firm did not express itself on sub-contracting meant that it was not going to resort to sub-contracting otherwise it would have indicated so and what the contracting authority was objecting to in this regard amounted just to spoon feeding and not essence, (j) whilst it was a fact that the numbering of the retyped 'Tender Form' was, admittedly, not carried out correctly and that care should have been taken by the appellant firm in that regard, yet, from the content and the spirit of the clauses in question, one could have become easily become aware to which clause reference was, effectively, being made, (k) with regard to the validity period of the tender at clause 4 of the original 'Tender Form', the appellant firm was perfectly correct in the firm's declaration that it would abide by the tender validity period as indicated by Transport Malta, meaning 150 days from final date of submission of tenders, but the firm's representative, certainly, did not alter the period requested, (l) if one were to apply legal terms to the letter then he would raise the issue that in the letter of rejection the contracting authority had misled his client with regard to her firm's right to appeal when it, erroneously, quoted Part XIII of LN 296 of 2010, which granted 10 days, whereas that applicable to this case was Reg. 21 of Part II, which granted 5 days within which to lodge the appeal and (m) considering the nature of the reasons for rejection, one had to question whether it was worthwhile for the evaluation board to be too strict in the legal interpretation of clauses and thus compel the contracting authority to cancel the tender and issue another one;

- having considered the contracting authority's representative's submissions, namely that (a) the 'Tender Form' was a very important part of the tendering documentation because by signing it the bidder would bind himself/herself/a firm with the tender conditions, (b) the 'Tender Form' in question was the standard one provided by the Contracts Department, (c) contrary to what the appellant firm seemed to imply, the contracting authority did not agree that, in the circumstances, all the requested information was provided by the appellant firm, (d) with regard to Part 'A' of the 'Tender Form', the appellant firm's representative only filled in the first line of the first table thus leaving out, apart from the notes 1 to 3, the second table which dealt

with sub-contracting, (e) it was correct that the appellant firm's representative had declared that she was submitting the tender in the firm's own right and not as part of a joint venture or consortium, but the second table of Part 'A' of the 'Tender Form' was still relevant to the contracting authority because the bidder had to declare if the firm was going to sub-contract any of the works/services and, if so, to name the sub-contractors and to indicate the extent of such sub-contracting and experience in similar services, (f) one had to make a clear distinction between being the 'sole bidder' in the tender submission and 'subcontracting' because the sole bidder, although 100% responsible, could resort to sub-contracting and the contracting authority requested an undertaking by the bidder as to whether one intended to sub-contract and, if so, to give the data requested. In this regard the contracting authority was left completely in the dark, (g) in retyping the 'Tender Form', the appellant firm mixed up the numbering of the clauses and, as a result, the cross references that were made between the clauses of the 'Tender Form' and those in the rest of the tender document were all mixed up and made no sense anymore - a case in point was clause 6 of appellant firm's 'Tender Form' (clause 8 in the original) with reference being made to clause 7 when clause 7 was renumbered by the appellant firm as 'clause 5', (h) a similar case was clause 10 of the appellant firm's 'Tender Form' (clause 12 in the original), (i) clause 5 in the original stipulated the tender validity date as 150 days from the final date of submission of tenders whereas clause 2 of the appellant firm's 'Tender Form' referred to "...a period as requested by TM", (j) in the light of the above, one could appreciate that the changes were not superficial but were significant changes to a very important part of the tender documentation and, as a consequence, the contracting authority was not simply splitting hairs, (k) even if the changes effected to the 'Tender Form' were not material, which was not so in this case, such alterations would render the submission administratively non-compliant as per tender conditions at clause 22.4, (l) Reg. 21 of Part II, which granted 5 days within which to lodge the appeal, should have been quoted by contracting authority, (m) whilst admitting the mistake made by Transport Malta as referred in (l), yet one had to bear in mind that the appellant firm was not disqualified because the appeal was not lodged according to regulations and (n) if the bidder left the sub-contracting part entirely out of the 'Tender Form', the contracting authority should in no way interpret that as an automatic 'no' for an answer but the bidder was expected to make a clear declaration in that specific regard,

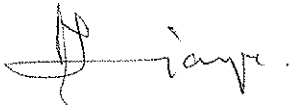
reached the following conclusions:

1. The Public Contracts Review Board opines that it is not the retyping which poses major concern, albeit not at all recommended for one to do so. As it so happens it is the fact that (a) holistically, this Board cannot agree with the appellant firm's claim, namely that the tender document as retyped was faithful to the original version and (b) it is the declaration relating to sub-contracting which was completely ignored that is unacceptable.
2. Undoubtedly, the Public Contracts Review Board feels that the 'confusion' created in the numbering by the appellant firm when the latter's representative opted to retype the document which considerably effected cross-referencing was as evident as much as it was avoidable. Needless to say that this Board argues that, apart from not being allowed, such a decision gave rise to a scenario supporting arbitrary guess

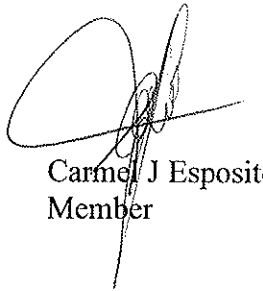
work as to what relates to what when this was supposed to be meant as a standard document applicable to all participating tenderers.

3. The Public Contracts Review Board argues that pertinent clarifications should have been sought by the appellant firm. This Board has never accepted any reference made to reliance on praxis previously adopted and accepted by contracting authorities, regardless whether the latter happened to be the same or not.
4. The Public Contracts Review Board cannot but place enough emphasis on the fact that bidders should (a) remain faithful to a tender document as presented to them by a contracting authority (b) refrain from taking arbitrary decisions unless previously agreed upon with the contracting authority itself.

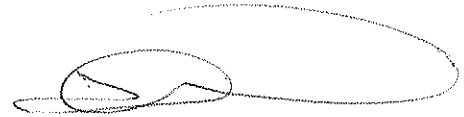
In view of the above this Board finds against the appellant company and recommends that the deposit paid by the latter should not be reimbursed.



Alfred R Triganza
Chairman



Carmel J Esposito
Member



Paul Mifsud
Member

6 February 2012