

PUBLIC CONTRACTS REVIEW BOARD

Case No. 376

CT/2225/2010; CT/023/2011

Tender for the Supply, Installation and Commissioning of a Positron Tomography - Computer Tomography (PET-CT) at Mater Dei Hospital

This closing date for this tender, with an estimated value of € 2,532,000 and which was published on the 4th February 2011, was the 29th March 2011.

Three (3) tenderers submitted their offers.

Charles De Giorgio Ltd filed an objection on the 12th December 2011 against the decisions of the Contracts Department that its offer was not the cheapest technically compliant offer and to recommend tender award to TP Joint Venture.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr Carmel Esposito and Mr Joseph Croker as members convened a meeting on Wednesday, 1st February 2012 to discuss this objection.

Present for the hearing:

Charles De Giorgio Ltd

Dr Antoine Cremona	Legal Representative
Mr John Sammut	Representative
Mr David Stellini	Representative
Mr Adriano Spiteri	Representative
Ms Maxine Balzan Demajo	Representative
Mr Andreas Dippold	Representative of Siemens AG Health Setor

TP Joint Venture

Dr John Gauci	Legal Representative
Mr Alexander Vella	Representative
Mr Ian Vella	Representative
Mr Brian Farrugia	Representative

Health Division

Mr Karl Farrugia	Director GHPS
Ms Stephanie Abela	Procurement Manager
Ms Jacqueline Camilleri	Representative

Evaluation Board

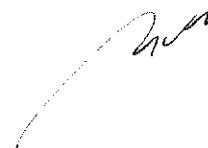
Mr Lawrence Vassallo	Chairman
Ms Rebekah Cilia	Member
Mr Gilbert Bonnici	Member
Ms Mary Scicluna	Member
Dr Maria Sciriha	Secretary

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

Dr Antoine Cremona, legal representative of Charles De Giorgio Ltd, the appellant company, made the following submissions:

- i. by letter dated 2nd December 2011 the Contracts Department had informed his client that the company's offer was not the cheapest technically compliant offer and that the tender was being recommended for award to TP Joint Venture Ltd;
 - ii. his client's offer was marginally more expensive than that of the recommended tenderer, namely about €24,000 or 0.92%;
 - iii. this tender was to be awarded to the cheapest technically compliant offer and, without going into the merits as to whether that method was better than the most economically advantageous offer (MEAT), his client was objecting to the lack of information that his firm had been furnished with regard to the financial bid of the recommended tenderer;
 - iv. volume 4 section 1 'Financial Bid' of the tender document consisted of six items which the bidder had to fill in and the award was to be made to the cheapest bid of the total thereof;
 - v. it should be noted that the six items that the bidder had to quote a price for varied in their nature to such an extent that, for example, some carried VAT whereas others did not and, given the marginal difference between his client's offer and that of the recommended tenderer, such variations assumed a high degree of importance;
 - vi. his client had made representations with the Department of Contracts to have a breakdown of the prices quoted by the recommended bidder so that the company would be in a position to check what those prices included and in which respect its offer turned out to be more expensive;
 - vii. the Department of Contracts turned down his client's request for a breakdown of the price of the awarded tender and advised the company to lodge an appeal in case its representatives felt aggrieved by the result of the adjudication;
 - viii. in all probability, his client would not have resorted to this appeal had the Department of Contracts furnished the breakdown requested;
- and
- ix. item one of the 'Breakdown of Costs' consisted of the equipment which represented the bulk of the contract – €2,099,990 out of €2,653,842 in his client's case – which item had to be quoted inclusive of VAT when this item did not attract VAT, and, as a result, the VAT element in the offers submitted was very relevant information and it was certainly not some fishing expedition.

Dr John Gauci, legal representative of TP Joint Venture, the recommended tenderer, submitted that:-



- a) according to the tender conditions, the award was to be given to the bidder who offered the cheapest total price for lot 1 and not the cheapest price on an itemised basis;
- b) the Public Contracts Review Board was free to analyse the breakdown of costs submitted by his client in order to ascertain that the company's total price was, after all, cheaper than that of the appellant company but he disagreed that the itemised details of his client's offer would be divulged to the appellant company who was its competitor;

and

- c) his client had quoted prices inclusive of VAT and the total price represented the all inclusive amount that the contracting authority would pay at the end of the day.

Mr Lawrence Vassallo, chairman of the adjudicating board, remarked that, in its evaluation, the adjudicating board applied the provisions of clause 32 'Criteria for Award' and that the appellant company did not ask the adjudicating board for any clarifications about the award but, presumably, such a request was made to the Department of Contracts.

The Public Contracts Review Board examined the financial bids of the appellant company and of the recommended tenderer and, intervening on behalf of the entire Board, the Chairman of the Public Contracts Review Board remarked that:

- i. item 1 of the appellant company's offer was 22% more expensive than that of the recommended tenderer, even though the latter was inclusive of items 4 (accessories) and 5 (training) as per the official grid;
 - ii. item 2 of the recommended tenderer was 174% of the price of the appellant company;
 - iii. item 3 of the recommended tenderer was 36% higher than that of the appellant company;
- and
- iv. whenever a tenderer noted that some aspect of the tender document required clarification or modification, the bidder had every right to bring up such issues prior to the closing date of the tender and not at appeal stage, so that if corrective measures were warranted then those would be circulated to all prospective bidders.

Dr Cremona pointed out that his client had to file an appeal and deposit €24, 120 to obtain the information that had just been communicated by the Public Contracts Review Board and he also proceeded by submitting that if the Department of Contracts had furnished his client with this information in the first place there would have been no need to lodge this appeal.

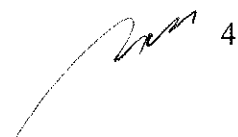
Dr Cremona appealed to the Public Contracts Review Board that when it arrived at the stage of whether to authorise the refund the deposit or not, it would keep in mind the

circumstances which compelled his client to lodge the appeal and to approve that the deposit be refunded to his client.

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 12th December 2011 and through the verbal submissions made during the hearing held on 1st February 2012, had objected against the decisions of the Contracts Department that its offer was not the cheapest technically compliant offer and to recommend tender award to TP Joint Venture;
- having noted the appellant firm's representatives' claims and observations regarding the fact that (a) by letter dated 2nd December 2011 the Contracts Department had informed the appellant company that its offer was not the cheapest technically compliant offer and that the tender was being recommended for award to TP Joint Venture Ltd, (b) the appellant company's offer was marginally more expensive than that of the recommended tenderer, namely about €24,000 or 0.92%, (c) this tender was to be awarded to the cheapest technically compliant offer and the appellant company was objecting to the lack of information that his firm had been furnished with regard to the financial bid of the recommended tenderer, (d) volume 4 section 1 'Financial Bid' of the tender document consisted of six items which the bidder had to fill in and the award was to be made to the cheapest bid of the total thereof, (e) it should be noted that the six items that the bidder had to quote a price for varied in their nature to such an extent that, for example, some carried VAT whereas others did not and, given the marginal difference between the appellant company's offer and that of the recommended tenderer, such variations assumed a high degree of importance, (f) had made representations with the Department of Contracts to have a breakdown of the prices quoted by the recommended bidder so that the company would be in a position to check what those prices included and in which respect its offer turned out to be more expensive, (g) the Department of Contracts turned down the appellant company's request for a breakdown of the price of the awarded tender and advised the company to lodge an appeal in case its representatives felt aggrieved by the result of the adjudication, (h) in all probability, the appellant company would not have resorted to this appeal had the Department of Contracts furnished the breakdown requested, (i) item one of the 'Breakdown of Costs' consisted of the equipment which represented the bulk of the contract – €2,099,990 out of €2,653,842 in the appellant company's case – which item had to be quoted inclusive of VAT when this item did not attract VAT, and, as a result, the VAT element in the offers submitted was very relevant information and it was certainly not some fishing expedition, (j) the appellant company disagreed that item 1 was without VAT because, apart from the cost of the equipment, it included other costs such as transport and installation and, in the said company's case, training costs which attracted VAT and (k) the appellant company had to file an appeal and deposit €24, 120 to obtain the information that had just been communicated by the Public Contracts Review Board and that if the Department of Contracts had furnished it with this information in the first place there would have been no need to lodge this appeal;
- having considered the contracting authority's representative's submissions, namely that (a) according to the tender conditions, the award was to be given to the bidder who offered the cheapest total price for lot 1 and not the cheapest price on an itemised basis, (b) the Public Contracts Review Board was free to analyse the breakdown of costs submitted by the recommended tenderer in order to ascertain that the company's total

 4

price was, after all, cheaper than that of the appellant company, (c) the appellant company disagreed that the itemised details of its offer would be divulged to the appellant company who was its competitor, (d) the appellant company had quoted prices inclusive of VAT and the total price represented the all inclusive amount that the contracting authority would pay at the end of the day, (e) in its evaluation, the adjudicating board applied the provisions of clause 32 'Criteria for Award' and (f) the appellant company did not ask the adjudicating board for any clarifications about the award but, presumably, such a request was made to the Department of Contracts;

reached the following conclusions:

1. The Public Contracts Review Board argues that, whilst whenever a tenderer noted that some aspect of the tender document required clarification or modification, the bidder had every right to bring up such issues prior to the closing date of the tender and not at appeal stage, so that if corrective measures were warranted then those would be circulated to all prospective bidders, yet, it is equally realistic for this Board to expect that any aggrieved party be the recipient of pertinent information when such information is requested, especially, when a party is contemplating on whether it has a case to present in its favour. Undoubtedly, depriving any party from basic and pertinent information which does not contain sensitive commercial information but which needs to be divulged in order to ensure full transparency is regarded as a 'sine qua non'. Needless to say that the fact that it is increasingly becoming evident that quite a few appellants are being requested to file an objection to gain access to some basic fundamental and rightful information is highly unacceptable and which needs immediate addressing as it is obvious that some offices are not fulfilling their duties.
2. The Public Contracts Review Board opines that, taken separately, (a) item 1 of the appellant company's offer was 22% more expensive than that of the recommended tenderer, (b) item 2 of the recommended tenderer was 174% of the price of the appellant company and (c) item 3 of the recommended tenderer was 36% higher than that of the appellant company, yet, holistically, it was a fact that the appellant company's offer was higher than that submitted by the recommended tenderer. Undoubtedly, this Board fails to understand how the evaluation board could have reached a different conclusion than the one it actually agreed on and proceeded to recommend.

In view of the above this Board finds against the appellant company but, considering the prevailing exceptional circumstances which transpired during the hearing, recommends that the deposit paid by the latter should be reimbursed.



Alfred R Triganza
Chairman



Carmel J Esposito
Member



Joseph Croker
Member

6 February 2012