

PUBLIC CONTRACTS REVIEW BOARD

Case No. 389

KMS/TEN/049/2011

Tender for the Provision and Delivery of Gym Equipment for Tal-Qroqq Fitness Centre

This call for tenders was published in the Government Gazette on the 25th October 2011. The closing date for this call with an estimated budget of € 100,000 (incl. VAT) was the 9th November 2011.

Three (3) tenderers submitted their offers.

Defiant Commercial Ltd filed an objection on the 19th January 2012 against the decisions of the Kunsill Malti għall-Isport not to recommend its offer for award since it was not the cheapest compliant tender and to recommend award to JGC Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Tuesday, 20th March 2012 to discuss this objection.

Defiant Commercial Ltd

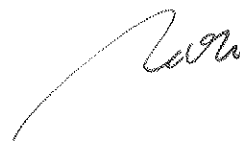
Dr Tanya Sciberras Camilleri	Legal Representative
Mr Luke Gregory	Director
Mr Vince Mintoff	Representative

JGC Ltd – No representative turned up.

Kunsill Malta għall-Isport

Evaluation Board

Mr Bertie Muscat	Chairman
Ms Margaret Mercieca	Member
Ms Tanya Zahra	Member
Mr Joseph Ludwig Cassar	Secretary



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

Dr Tanya Sciberras Camilleri, legal representative of Defiant Commercial Ltd, the appellant company, stated that by letter dated 13th January 2012 the contracting authority had informed her client that the company's offer was not successful since it was not the cheapest compliant offer. Dr Sciberras Camilleri made the following submissions:-

- i. her client was administratively and technically compliant;
- ii. clause 24 of the tender document provided as follows:

'The tender shall be awarded on the criterion of the most economically advantageous offer. Provided that special consideration shall be given, in particular to the price, the quality of the goods and services and the Supplier's experience in supplying the goods and providing the services.'

- iii. clause 28 (5) of the Public Procurement Regulations provided that:

'Where the contract is to be awarded on the basis of the most economically advantageous offer, the contracting authority shall, in the contract documents or, in the case of a competitive dialogue, in the descriptive document, indicate all the criteria it intends to apply in the determination of the award, indicating the relative weighting which can be expressed by providing for a range with an appropriate maximum spread:

Provided that where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance.'

- iv. taking into account the reason given in the letter of rejection, it was evident that the adjudicating board awarded this tender on the criterion of the cheapest compliant tender and not on the basis of the most economically advantageous tender (MEAT), as laid down in clause 24 of the tender document and no weightings were used;
 - v. her client should have been informed by fax or email and not solely by post because by the time the appellant company received the letter it had only two days or so left within which to lodge an appeal;
 - vi. this tender had already been issued twice before and, on both occasions, the process was found to be defective and had to be cancelled;
- and
- vii. the contracting authority had no right to change the award criteria during the tender evaluation stage.

Mr Bertie Muscat, chairman of the adjudicating board, made the following remarks:-

- i. the technical advisor attached to the adjudicating board had recommended that the tender be awarded to the appellant company because the latter offered the same type of equipment that they already had on site;
- ii. the adjudicating board disagreed with that advice because with that line of reasoning the Kunsill Malta għall-Isport might as well have issued a direct order rather than a call for tenders;
- iii. on being informed by the same technical expert that both offers were compliant with the tender specifications the board opted for the cheaper price, especially once the difference was quite substantial, namely €59,140 against €96,600;
- iv. the technical expert was not asked to fill in the form declaring his impartiality;
and
- v. albeit no weightings were used in the evaluation of the tender in question yet, in tenders issued subsequent to the one under examination, the Kunsill Malta għall-Isport has been using the weightings mentioned in the Public Procurement Regulations;

Ms Margaret Mercieca, a member of the adjudicating board, stated that the tender document did not include any weighting grid. She added that in this case it did not matter if the new equipment was not of the same make as the one already in place so long as it did meet the published specifications and, from then on, the deciding criterion applied by the adjudicating board was the price.

The Chairman Public Contracts Review Board remarked that:-

- a. evidently, the award criterion used in the adjudication of this tender, the cheapest compliant tender, did not match the criterion set out in clause 24 of the tender document, namely the most economically advantageous tender (MEAT);
- b. whilst, in the first evaluation report, the recommended tenderer, JGC Ltd, was disqualified for not having submitted the copy of the tender submission and the award was recommended in favour of the appellant company, yet, acting on the advice of the Department's Contracts Committee (DCC), JGC Ltd was reintegrated in the process and recommended for award since that shortcoming did not merit disqualification;
- c. the Public Contracts Review Board's main concern was that the tendering process followed a correct and transparent course;
and
- d. in case of difficulties encountered during the tendering process, the contracting authority ought to seek advice from the Contracts Department as to the best way forward.



In conclusion Dr Sciberras Camilleri declared that the hearing confirmed that the adjudicating board did not follow the award criterion laid down in the tender document.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'letter of objection' dated 19th January 2012 and also through their verbal submissions presented during the hearing held on the 20th March 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) the contracting authority had informed the appellant company's offer was not successful since it was not the cheapest compliant offer, (b) the company's offer was administratively and technically compliant, (c) clause 24 of the tender document stated that the tender shall be awarded on the criterion of the most economically advantageous offer, (d) clause 28 (5) of the tender document provided *'that where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance'* (e) taking into account the reason given in the letter of rejection, it was evident that the adjudicating board awarded this tender on the criterion of the cheapest compliant tender and not on the basis of the most economically advantageous tender (MEAT), as laid down in clause 24 of the tender document and no weightings were used, (f) the appellant company should have been informed by fax or email and not solely by post because by the time the appellant company received the letter it had only two days or so left within which to lodge an appeal, (g) this tender had already been issued twice before and, on both occasions, the process was found to be defective and had to be cancelled and (h) the contracting authority had no right to change the award criteria during the tender evaluation stage;
- having considered the contracting authority's representatives' reference to the fact that (a) the technical advisor attached to the adjudicating board had recommended that the tender be awarded to the appellant company because the latter offered the same type of equipment that they already had on site, (b) the adjudicating board disagreed with that advice because with that line of reasoning the Kunsill Malta għall-Isport might as well have issued a direct order rather than a call for tenders, (c) on being informed by the same technical expert that both offers were compliant with the tender specifications the board opted for the cheaper price, especially once the difference was quite substantial, namely €59,140 against €96,600, (d) the technical expert was not asked to fill in the form declaring his impartiality, (e) albeit no weightings were used in the evaluation of the tender in question yet, in tenders issued subsequent to the one under examination, the Kunsill Malta għall-Isport has been using the weightings mentioned in the Public Procurement Regulations and (f) in this case it did not matter if the new equipment was not of the same make as the one already in place so long as it did meet the published specifications and, from then on, the deciding criterion applied by the adjudicating board was the price,

reached the following conclusions, namely:

1. The Public Contracts Review Board acknowledges the fact that whilst, in the first evaluation report, the recommended tenderer, JGC Ltd, was disqualified for not having submitted the copy of the tender submission and the award was recommended in favour of the appellant company, yet, acting on the advice of the Department's Contracts Committee (DCC), JGC Ltd was reintegrated in the process and recommended for award since that shortcoming did not merit disqualification.
2. The Public Contracts Review Board places emphasis on the fact that one of its major concerns remains that a tendering process follows a correct and transparent course and that is why it opines that in case of difficulties encountered during a tendering process, the contracting authority ought to seek advice from the Contracts Department as to the best way forward. It evidently transpires that, in this instance, the evaluation board failed to follow the remit given to it by the same tender specifications which, *inter alia*, necessitated that the MEAT method of evaluation be followed.

In view of the above, this Board finds in favour of the appellant company and recommends that the fee paid by the latter to file the objection be reimbursed by the pertinent authority.

Furthermore, this Board recommends that a fresh call be issued with special attention being given to terms and references in order to avoid further repetition of same erroneous methods adopted in the evaluation process. Needless to say that, this Board expects that future members of the evaluation board would be knowledgeable enough as to what is required of them.



Alfred R Triganza
Chairman



Carmel Esposito
Member



Joseph Croker
Member

11th April 2012