

PUBLIC CONTRACTS REVIEW BOARD

Case No. 391

OPM/2202/2011

Tender for the Provision of an EU Funds Service for the Office of the Prime Minister

This call for tenders was published in the Government Gazette on the 21st October 2011. The closing date for this call with an estimated budget of € 36,000 for 18 months was the 4th November 2011.

Two (2) tenderers submitted their offers.

PKF (Malta) Ltd filed an objection on the 7th December 2011 against the decisions of the Office of the Prime Minister to disqualify its offer as it was considered to be administratively non-compliant and to recommend the award of the tender to BEurope 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 Friday, 23rd March 2012 to discuss this objection.

PKF (Malta) Ltd

Dr Sarah Tua	Legal Representatives
Mr George Mangion	Representative
Mr Reuben Zammit	Representative

BEuropeLtd - no representative turned up.

Office of the Prime Minister

Mr Alex Magro	Director Corporate Services
Mr Charles Vella	Representative
Ms Marica Saliba	Representative

Evaluation Board

Dr Andreina Fenech Farrugia	Chairperson
Ms Sylvia Gauci	Member
Mr Mario Borg Olivier	Member

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

Dr Sarah Tua, legal representative of PKF (Malta) Ltd, the appellant firm, made the following submissions:-

- i. by email dated 30th November 2011, the contracting authority had informed her client that its offer was not considered administratively compliant and that the tender was awarded to BEurope Ltd as the latter's bid was considered to be the most economically advantageous tender;
 - ii. clause 30.2 of the tender document stated that the "*Evaluation Committee will check the compliance of the tenders with the instructions given in the tender document, and particularly the documentation submitted in respect of clause 16*";
 - iii. her client contended that all the documentation requested at clause 16 had in fact been submitted and even if, for the sake of the argument, the contracting authority noted any shortcomings the notes to clause 16 entitled the contracting authority to seek clarifications and rectification;
- and
- iv. the price offered by the recommended tenderer of €29.50 per hour inclusive of VAT was substantially higher than that submitted by her client, namely €21.79 per hour inclusive of VAT.

The Chairman Public Contracts Review Board observed that it was not sufficient for the contracting authority to inform the bidder's representative that his firm's offer was not administratively compliant but the unsuccessful tenderer had to be furnished with the reasons for his firm's disqualification as laid down in the Public Procurement Regulations, namely:-

'Reg. 84 The communication to each tenderer of the proposed award shall be accompanied by a summary of the relevant reasons relating to the rejection of the tender as set out in regulation 44(3), and by a precise statement of the exact standstill period.

Reg. 44 (3) The contracting authority shall, within fifteen days of the date on which the request is received by a party concerned, inform:
(a) any unsuccessful candidate, of the reasons for rejection of its application;
(b) any unsuccessful tenderer, of the reasons for the rejection of his tender, including, for the cases referred to in regulations 46(3) and (4), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirement';

The Chairman Public Contracts Review Board stressed that the appellant firm had the right to know the reasons for its disqualification in order to be in a position to verify the facts and to decide if there were sufficient grounds to lodge an appeal and, if so, to

enable the firm's representative/s to prepare the firm's case. He admonished the contracting authority to refrain from its current practice.

Dr Andreina Fenech Farrugia, chairperson of the adjudicating board, submitted that:-

a. clause 6 'Selection Criteria', sub-clause 6.1 stated that

"In order to be considered eligible for the award of the contract, tenderers must provide evidence that they meet or exceed certain minimum qualification criteria described hereunder.

**The expert must be in possession of a Masters Degree in Management. A copy of this certificate is to be submitted with the tender document".*

b. the appellant firm did not submit the certificate mentioned in 'a' above;

c. clause 16.1 (b) 'Selection Criteria' stated that

"The expert must be in possession of a Masters degree in Management and that the corresponding and the relevant 'Note 2' provided that: No rectification shall be allowed. Only clarifications on the submitted information may be requested";

and

d. clause 16.1 (c) (iii) requested a 'Statement of Exclusivity of Key Expert to be employed on contract (Form 3.5)' which mandatory requirement was not met by the appellant firm.

Mr George Mangion, representative of the appellant firm, submitted that:-

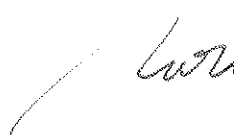

- i. whilst PKF (Malta) Ltd had a team of experts and they were qualified, yet, admittedly the requested Masters degree in management certificate of the key expert had not been submitted;
- ii. since the contracting authority did not inform his firm of the details that led to the latter's disqualification, he could not confirm if the 'Statement of Exclusivity of Key Expert' had, in fact, been submitted;

and

- iii. the contracting authority acted incorrectly in not informing his firm of the detailed reasons for the latter's disqualification because that denied the firm's representative/s the opportunity to adequately prepare for the hearing.

The Chairman Public Contracts Review Board remarked that:

- (a) once the missing documents were mandatory requirements there was no room for a clarification in that regard because a clarification was allowed on submitted information and not on information that should have been submitted but was omitted,



and

- (b) the non-submission of certificates/statements was easily verifiable from the tender submission of the appellant firm which was at the disposal of the Public Contracts Review Board and it was simply a question of whether the documents were there or not which issue did not require argumentation on the part of the appellant firm for which its representative/s might have required time to work on.

At this stage the Public Contracts Review Board went through the appellant's tender submission and it was confirmed that the 'Statement of Exclusivity of Key Expert' had not been submitted.

Dr Tua referred to clause 30.4 of the tender document which provided, among other things, that

"Tenders who are deemed to be provisionally technically compliant through the evaluation of their technical offer (especially the specifications) shall be requested to submit the CVs and Declarations of Exclusivity and Availability so that the Evaluation Committee will corroborate the technical compliance of the offers received."

The Chairman Public Contracts Review Board noted that 16.1 (c) (iii) and clause 30.4 were, somehow, conflicting with regard to the stage at which the CVs and 'Statements of Exclusivity' were to be submitted. Undoubtedly, proceeded this Board's chairman, the appellant firm could have asked for a clarification on this point, preferably prior to the submission of the firm's offer. He added that had the non-submission of the 'Statement of Exclusivity' been the only reason for disqualification, perhaps one could have given the benefit of the doubt to the appellant firm. Yet, continued the Chairman Public Contracts Review Board, the same could not be said in the case of the non-submission of the certificate requested at clause 16.1 (b) (i).

At this point the hearing was brought to a close.

This Board,

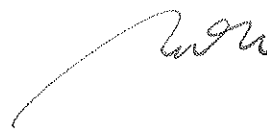
- having noted that the appellants, in terms of their 'letter of objection' dated 7th December 2012 and also through their verbal submissions presented during the hearing held on the 23rd March 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by email dated 30th November 2011, the contracting authority had informed the appellant firm that its offer was not considered administratively compliant and that the tender was awarded to BEurope Ltd as the latter's bid was considered to be the most economically advantageous tender, (b) the appellant firm contended that all the documentation requested at clause 16 had in fact been submitted and even if, for the sake of the argument, the contracting authority noted any shortcomings the notes to clause 16 entitled the contracting authority to seek clarifications and rectification, (c) the price offered by the recommended tenderer of €29.50 per hour inclusive of VAT was

substantially higher than that submitted by the appellant firm, namely €21.79 per hour inclusive of VAT, (d) whilst PKF (Malta) Ltd had a team of experts and they were qualified, yet, admittedly the requested Masters degree in management certificate of the key expert had not been submitted, (e) since the contracting authority did not inform the appellant firm's representative of the details that led to the latter's disqualification, he could not confirm if the 'Statement of Exclusivity of Key Expert' had, in fact, been submitted, (f) the contracting authority acted incorrectly in not informing the appellant firm of the detailed reasons for the latter's disqualification because that denied the firm's representative/s the opportunity to adequately prepare for the hearing and (g) clause 30.4 of the tender document provided, among other things, that "*Tenders who are deemed to be provisionally technically compliant through the evaluation of their technical offer (especially the specifications) shall be requested to submit the CVs and Declarations of Exclusivity and Availability so that the Evaluation Committee will corroborate the technical compliance of the offers received.*";

- having considered the contracting authority's representatives' reference to the fact that (a) clause 6 'Selection Criteria', sub-clause 6.1 stated that "*In order to be considered eligible for the award of the contract, tenderers must provide evidence that they meet or exceed certain minimum qualification criteria ...*" namely "*that the expert must be in possession of a Masters Degree in Management. A copy of this certificate is to be submitted with the tender document*", (b) the appellant firm did not submit the certificate relating to any Masters Degree in Management, (c) clause 16.1 (b) 'Selection Criteria' *inter alia* stated that "*No rectification shall be allowed. Only clarifications on the submitted information may be requested*" and (d) clause 16.1 (c) (iii) requested a 'Statement of Exclusivity of Key Expert to be employed on contract (Form 3.5)' which mandatory requirement was not met by the appellant firm,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that it was not sufficient for the contracting authority to inform the bidder's representative that his firm's offer was not administratively compliant but the unsuccessful tenderer had to be furnished with the reasons for his firm's disqualification as laid down in the Public Procurement Regulations. Undoubtedly, the appellant firm had the right to know the reasons for its disqualification in order to be in a position to verify the facts and to decide if there were sufficient grounds to lodge an appeal and, if so, to enable the firm's representative/s to prepare the firm's case.
2. The Public Contracts Review Board took full cognisance of the fact that the appellant firm's representative admitted that albeit he argued that PKF (Malta) Ltd had a team of experts and they were qualified, yet, it was also a fact that his firm failed to submit the requested Masters degree in management certificate of the key expert which was mandatory.
3. This Board contends that once the missing documents were mandatory requirements there was no room for a clarification in that regard because a clarification was allowed on submitted information and not on information that should have been submitted but was omitted.



4. Contrary to what the appellant firm had argued the Public Contracts Review Board submits that the non-submission of certificates/statements was easily verifiable from the tender submission of the appellant firm which was at the disposal of the Public Contracts Review Board and it was simply a question of whether the documents were there or not which issue did not require argumentation on the part of the appellant firm for which its representative/s might have required time to work on.

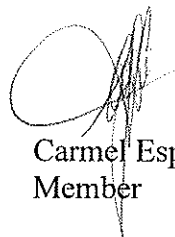
5. The Public Contracts Review Board noted that 16.1 (c) (iii) and clause 30.4 were, somehow, conflicting with regard to the stage at which the CVs and 'Statements of Exclusivity' were to be submitted. This Board thus feels that the appellant firm could have asked for a clarification on this point, preferably prior to the submission of the firm's offer. Furthermore, on the same subject matter, this Board feels that had the non-submission of the 'Statement of Exclusivity' been the only reason for disqualification, perhaps one could have given the benefit of the doubt to the appellant firm. Yet, this Board opines that the same could not be said in the case of the non-submission of the certificate requested at clause 16.1 (b) (i).

In view of the above, this Board finds against the appellant company.

Nevertheless, this Board acknowledges that the appellant firm could have opted to desist from proceeding with the filing of its objection had the firm been made aware by the contracting authority of the reasons leading to the administrative non compliance of its submission. As a result this Board recommends that the deposit paid by the latter to file this objection should be reimbursed.



Alfred R Triganza
Chairman



Carmel Esposito
Member



Joseph Croker
Member

11th April 2012