

PUBLIC CONTRACTS REVIEW BOARD

Case No. 404

TM/070/2011

Tender for the Appointment of an E-Learning Partner for the Provision of Customer Care and Health and Safety Courses

This call for tenders was published in the Government Gazette on the 26th July 2011. The closing date for this call with an estimated budget of € 47,200 was the 26th August 2011.

Three (3) tenderers submitted their offers.

The Malta Institute of Management filed an objection on the 7th February 2012 against the technical evaluation carried out by Transport Malta whereby its offer obtained 78 of the marks which was short of the 80 marks required to qualify for financial evaluation and against the decision to award the tender to Future Focus Ltd as the cheapest compliant tender.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Carmel Esposito and Mr Paul Mifsud as members convened a public hearing on Wednesday, 9th May 2012 to discuss this objection.

Present for the hearing:

Malta Institute of Management

Dr Adrian Delia	Legal Representative
Mr Lawrence Mizzi	Representative
Mr Omar Vella	Representative
Not. Matthew Pulis	Representative

Future Focus Ltd

Dr Peter Fenech	Legal Representative
Dr Simon Galea Testaferrata	Legal Representative
Mr Stefan Salomone	Representative

Transport Malta

Dr Joseph Camilleri	Legal Representative
Mr Maurizio Micallef	Procurement Manager

Evaluation Board

Ms Nadya Bruno Olivier	Member
Mr Noel Galea	Member
Mr John Muscat Drago	Member



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

Dr Adrian Delia, legal representative of the Malta Institute of Management, the appellant, submitted that:-

- i. by email dated 31st January 2012, the contracting authority had informed his client that, following technical evaluation, the Institute's offer obtained only 78 marks which fell short of the 80 marks required for it to qualify for financial consideration and that the tender was recommended for award to Future Focus Ltd for the price of €78,880 the latter being the cheapest compliant tender;
 - ii. the tender was to be awarded on the basis of the Most Economically Advantageous Tender (MEAT) such that the points had to be allocated on predetermined criteria, in this case as per grid at clause 30.4 of the tender document, and in such a manner that the bidders themselves would be able to understand the technical evaluation process;
 - iii. the contracting authority did not provide a breakdown as per criteria that featured in the grid of the 78 points acquired by his client and that was not in line with the transparency that public procurement called for;
 - iv. the Malta Institute of Management considered that it had adequate and proven experience in this sector and it was similarly competent in the other areas to qualify from the technical evaluation;
 - v. following the rejection of its tender, his client learned from information provided by his ISP that the evaluation board accessed the relative site for only a few seconds which, *per se*, meant that the evaluation board carried out a rather superficial examination of the technical content of his client's bid;
 - vi. it was incomprehensible how his client was disqualified for being only 2 points short of the 80 marks required under technical requirements;
- and
- vii. the tender was being recommended for award to Future Focus Ltd for €77,880, which was substantially higher than the price of €59,449 quoted by his client.

Dr Joseph Camilleri, legal representative of Transport Malta, explained that:-

- a. considering the nature of the services requested in this tender, apart from the price, one had to take into account the quality of the service and that was why Transport Malta resorted to the MEAT procedure;
- b. whilst in its letter of objection the appellant Institute complained about the number of points allocated to each criterion in the evaluation grid, yet that grid was published in the tender document and, as a result the appellant could have



objected in that regard prior to the closing date of the tender and not upon its disqualification;

- c. according to clause 34 'Notification of Award, Contract Clarifications' sub-clause 2 the contracting authority had to notify unsuccessful tenderers of the outcome of the evaluation process, the criteria for award, the name of the successful tenderer, the recommended price, the deadline to submit an appeal and the deposit required to lodge the appeal, and the contracting authority observed those provisions;
- d. the appellant did not make a request for further information with regard to the evaluation process;
- e. with regard to the price the appellant Institute had quoted the annual price of €59,944 in the financial bid whereas in the *tender form* the Institute declared that the total price of the tender was also €59,944 and this when the tender covered a period of two years;
- f. when the appellant was asked for a clarification about the price it offered, even though, strictly speaking, there was no need for one, the appellant confirmed by letter dated 28th September 2011 that the price quoted in the financial bid and in the *tender form* was for a period of one year;

and

- g. therefore, over a two-year period the appellant's price, in fact, amounted to €119,888 and so, contrary to what the appellant was claiming, the recommended price, namely €77,880, was substantially cheaper than that submitted by the appellant.

Dr Peter Fenech, legal representative of Future Focus Ltd, the recommended tenderer, submitted that:-

- i. if the appellant was not comfortable with any provision in the tender document then its representative should have aired his / her objection prior to the closing date of the tender and not after the tender evaluation process;
 - ii. with regard to transparency, the contracting authority abided by the provisions of clause 34.2 and, moreover, the appellant did not even ask for more information regarding the Institute's disqualification;
- and
- iii. the adjudicating board had conducted a correct evaluation of the bids and it emerged that his client was compliant and the cheapest.

Mr Maurizio Micallef, also representing Transport Malta:-

- a. explained and demonstrated to the appellant that the recommended tenderer had quoted the annual price in the financial bid, €38,940 whereas in the *tender form*



the company declared the tender price of €78,880 which was reproduced in the schedule of prices;

- b. on the other hand, Mr Micallef referred the appellant to the total tender price its representative had declared in the Institute's bid's *tender form*, namely €59,946 – which was later clarified by the appellant's representative himself as referring to the price *per annum* - which was similar to the annual price the same tenderer had quoted in its financial bid;
- c. stated that the schedule of prices was drawn up at tender opening stage which prices were taken from the respective tender form 'as is, where is' and without any other consideration;

and

- d. at a later stage, during the evaluation of the tender, the adjudicating board came across the appellant's financial bid which indicated the annual price of €59,944, and that was why a clarification was sought on the price.

The Chairman, Public Contracts Review Board, remarked that, from the evidence produced, it was quite clear that the appellant's price for the two-year contract period amounted to €119,888 (€59,944 x2) and that the same appellant Institute was or should have been aware of that all along because that emerged from its own tender submission and clarification.

Dr Delia:-

- i. argued that the purpose why his client lodged the appeal on the technical evaluation process was that of having the Institute's bid reinstated and since, according to the published schedule of tenders, its offer was the cheapest then it would win the contract;
 - ii. concluded that, given the information that has emerged at the hearing about the total prices offered by the recommended tenderer and by his client, there was no further scope in carrying on with the appeal as it no longer served its purpose;
- and
- iii. requested the Public Contracts Review Board to consider refunding the deposit to his client once the Institute had been misled by the information displayed on the schedule of tenders as its representatives thought that they were comparing prices on a like-with-like basis.

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 6th February 2012 and also through their verbal submissions presented during the hearing held on the 9th May 2012, had objected to the decision taken by the pertinent authorities;



- having noted all of the appellant Institute's representative's claims and observations, particularly, the references made to the fact that (a) by email dated 31st January 2012, the contracting authority had informed the appellant Institute that, following technical evaluation, the Institute's offer obtained only 78 marks which fell short of the 80 marks required for it to qualify for financial consideration and that the tender was recommended for award to Future Focus Ltd for the price of €78,880 the latter being the cheapest compliant tender, (b) the tender was to be awarded on the basis of the Most Economically Advantageous Tender (MEAT) such that the points had to be allocated on predetermined criteria, in this case as per grid at clause 30.4 of the tender document, and in such a manner that the bidders themselves would be able to understand the technical evaluation process, (c) the contracting authority did not provide a breakdown as per criteria that featured in the grid of the 78 points acquired by the appellant Institute and that was not in line with the transparency that public procurement called for, (d) the Malta Institute of Management considered that it had adequate and proven experience in this sector and it was similarly competent in the other areas to qualify from the technical evaluation, (e) following the rejection of its tender, the appellant Institute learned from information provided by his ISP that the evaluation board accessed the relative site for only a few seconds which, *per se*, meant that the evaluation board carried out a rather superficial examination of the technical content of the Malta Institute of Management's bid, (f) it was incomprehensible how the appellant Institute was disqualified for being only 2 points short of the 80 marks required under technical requirements, (g) the tender was being recommended for award to Future Focus Ltd for €77,880, which was substantially higher than the price of €59,449 quoted by the appellant Institute, (h) argued that the purpose why the appellant Institute lodged the appeal on the technical evaluation process was that of having the Institute's bid reinstated and since, according to the published schedule of tenders, its offer was the cheapest then it would win the contract, (i) concluded that, given the information that has emerged at the hearing about the total prices offered by the recommended tenderer and by the appellant Institute, there was no further scope in the latter carrying on with the appeal as it no longer served its purpose and (j) requested the Public Contracts Review Board to consider refunding it the deposit once the Institute had been misled by the information displayed on the schedule of tenders as its representatives thought that they were comparing prices on a like-with-like basis;
- having considered the contracting authority's representatives' reference to the fact that (a) considering the nature of the services requested in this tender, apart from the price, one had to take into account the quality of the service and that was why Transport Malta resorted to the MEAT procedure, (b) whilst in its letter of objection the appellant Institute complained about the number of points allocated to each criterion in the evaluation grid, yet that grid was published in the tender document and, as a result the appellant Institute could have objected in that regard prior to the closing date of the tender and not upon its disqualification, (c) according to clause 34 'Notification of Award, Contract Clarifications' sub-clause 2 the contracting authority had to notify unsuccessful tenderers of the outcome of the evaluation process, the criteria for award, the name of the successful tenderer, the recommended price, the deadline to submit an appeal and the deposit required to lodge the appeal, and the contracting authority observed those provisions, (d) the appellant Institute did not make a request for further information with regard to the evaluation process, (e) with regard to the price the appellant Institute had quoted the

annual price of €59,944 in the financial bid whereas in the *tender form* the Institute declared that the total price of the tender was also €59,944 and this when the tender covered a period of two years, (f) when the appellant Institute was asked for a clarification about the price it offered, even though, strictly speaking, there was no need for one, the appellant Institute confirmed by letter dated 28th September 2011 that the price quoted in the financial bid and in the *tender form* was for a period of one year, (g) therefore, over a two-year period the appellant Institute's price, in fact, amounted to €119,888 and so, contrary to what the appellant Institute was claiming, the recommended price, namely €77,880, was substantially cheaper than that submitted by the appellant Institute, (h) explained and demonstrated to the appellant Institute that the recommended tenderer had quoted the annual price in the financial bid, €38,940 whereas in the *tender form* the company declared the tender price of €78,880 which was reproduced in the schedule of prices, (i) on the other hand, Mr Micallef referred the appellant Institute to the total tender price its representative had declared in the Institute's bid's *tender form*, namely €59,946 – which was later clarified by the appellant Institute's representative himself as referring to the price *per annum* - which was similar to the annual price the same tenderer had quoted in its financial bid, (j) stated that the schedule of prices was drawn up at tender opening stage which prices were taken from the respective tender form 'as is, where is' and without any other consideration and (k) at a later stage, during the evaluation of the tender, the adjudicating board came across the appellant Institute's financial bid which indicated the annual price of €59,944, and that was why a clarification was sought on the price;

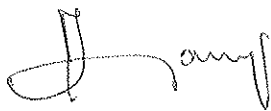
- having considered the recommended tenderer's representatives' reference to the fact that (a) if the appellant Institute was not comfortable with any provision in the tender document then its representative should have aired his / her objection prior to the closing date of the tender and not after the tender evaluation process, (b) with regard to transparency, the contracting authority abided by the provisions of clause 34.2 and, moreover, the appellant Institute did not even ask for more information regarding the Institute's disqualification and (c) the adjudicating board had conducted a correct evaluation of the bids and it emerged that the recommended tenderer was compliant and the cheapest, reached the following conclusions, namely:

1. The Public Contracts Review Board feels that the contracting authority - in line with criteria that featured in the grid - should have provided a breakdown of the 78 points acquired by the appellant Institute and, in so doing the contracting authority has acted in contravention of the principles of transparency so highly necessary in these circumstances. This lack of transparency augmented the appellant Institute's need to seek an explanation via a formal appeal lodged fully within its rights. As a matter of fact the appellant Institute argued that the purpose why it lodged the appeal on the technical evaluation process was to enable the Institute's bid to be reinstated, especially, in view of the fact that, according to the published schedule of tenders, its offer was the cheapest leading it to automatically win the contract.
2. The Public Contracts Review Board opines that, from the evidence produced, it was quite clear that the appellant Institute's price for the two-year contract period amounted to €119,888 (€59,944 x2) and that the same appellant Institute was or should have been aware of that all along because that emerged from its

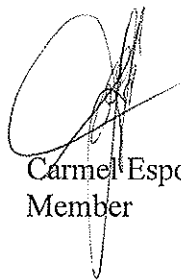
own tender submission and clarification. This Board gave considerable weight to the fact that, when the appellant Institute was asked by the evaluation board for a clarification about the price it offered, even though, strictly speaking, there was no need for one, the appellant Institute confirmed by letter dated 28th September 2011 that the price quoted in the financial bid and in the *tender form* was for a period of one year which, as a consequence, implied that over a two-year period the appellant Institute's price, in fact, amounted to €119,888 and so, contrary to what the appellant Institute was claiming, over the two year period under review, the recommended price, namely €77,880, was substantially cheaper than that submitted by the appellant Institute.

3. The Public Contracts Review Board takes cognisance of the fact that, given the information that has emerged at the hearing about the total prices offered by the recommended tenderer and by the appellant Institute, the said appellant Institute, arbitrarily, decided that there was no further scope in it carrying on with the appeal as it no longer served its purpose albeit, rightly so, arguing that all this would have been avoided had the adjudication process been more transparent.
4. The Public Contracts Review Board, took full notice of the request made by the appellant Institute's representatives, namely for the Board to consider refunding the appellant Institute the deposit it paid for the said complaint to be formally lodged in view of the fact that the Institute had been misled by the information displayed on the schedule of tenders as its representatives thought that they were comparing prices on a like-with-like basis. This Board has decided to favourably accede to this request giving the appellant Institute the benefit of the doubt.

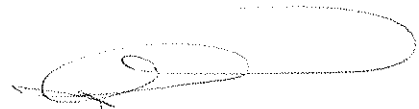
In view of the above, this Board generally finds against the appellant Institute but recommends that the said appellant be reimbursed with the deposit paid for the appeal to be lodged.



Alfred R Triganza
Chairman



Carmel Esposito
Member



Paul Mifsud
Member

28th May 2012