

PUBLIC CONTRACTS REVIEW BOARD

Case No. 667

DES 142/2013

Tender for the Procurement of Network Switches and Fibre Optic Transducers for Various Schools.

The tender was published on the 4th October 2013. The closing date was the 25th October 2013.

The estimated value of the Tender was €112,711 (Exclusive of VAT).

Eight (8) bids had been received for this tender.

On the 23rd December 2013 Computer Solutions Limited filed an objection against the rejection of its offer as being administratively non-compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancillieri as members convened a hearing on Thursday the 6th February 2014 to discuss the objection.

Present for the hearing were:

Computer Solutions Limited - Appellant

Mr Edward Cauchi	Representative
Mr Anton Cristina	Representative

Klikk Limited - Preferred Bidder

Mr Jason Cutajar	Representative
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Ministry for Education and Employment - Contracting Authority

Ms Joelle Mifsud Bonnici	Chairperson Evaluation Board
Mr Carlo Azzopardi	Member Evaluation Board
Mr Franco Costa	Member Evaluation Board
Ms Roslynn Vella	Representative

The Chairman made a brief introduction and the representative of the appellant was invited to make his submissions regarding the objection.

Mr Anton Cristina, a Director at the appellant firm, on behalf of the same said that appellant's bid had been found to be administratively non-compliant. This was because of the requested references, of having provided similar work of over €20,000 during the years 2011 and 2012, as provided by appellant did not satisfy the requirements. He continued that appellant had submitted five (5) references relating to the year 2013. He contended that the appellant's offer was cheaper than that of the recommended bidder and that appellant's offer was technically compliant. He said that the reason for this objection was that the tender requested the provision of the HP 2530 switch, which is a layer three switch that only came on the market in June 2013. The tender requested references for the years 2011 and 2012, and such references could only provide for products that were "end of life". The references requested for the product could not be provided since the product was not available at the time. It was for this reason that the appellant had submitted references for the requested product supplied during 2013. To submit references for the years 2011 and 2012 would have been irrelevant, since the product did not even exist. The products available in the years 2011 and 2012 did not match the technical requisites of the tender, and for this reason, appellant only submitted references for the year 2013 when the product became available. Appellant would not submit references on products that were not being offered in the present tender.

Mr Franco Costa, a member on the evaluation board, on behalf of the contracting authority said that the first filter for administrative compliance was the proof of technical capacity. Bidders were requested to state two principal deliveries of a similar nature which had to be at least one per year and at least of €20,000. The tender did not ask for deliveries to be of a specific product. Appellant could have submitted deliveries made during the years 2011 and 2012 of similar products. In appellant's bid, however, the dates 2011 and 2012 were changed to 2013 and the offer only quoted deliveries made during 2013. Appellant listed five projects, but all delivered during 2013. Appellant's tender was very clear and this could not be accepted.

Mr Anton Cristina said the question here is the interpretation of "a similar nature". He contended that the tender was for IT related equipment and in this field the requested product was not of a similar nature. The appellant's offer was for a layer three switch while the previous available product was a layer two switch which does not perform all the functions of a layer three switch and therefore cannot be referred to as being of a similar nature. This layer three switch only came in production in June 2013 and therefore one could not state that other deliveries of layer two switches were of a similar nature. He insisted that the previous switches could not be referred to as being of a similar nature.

Mr Franco Costa, explaining similar nature gave an example the purchase of a table. This could be referred to as furniture and other pieces of furniture can all be referred to as being of a similar nature. The same can be said in the present case, layer two and layer three switches are of a similar nature. If appellant misunderstood what the tender meant by similar nature, a clarification could have been requested. The specifications were clear and were not misleading.

Mr Anton Cristina said that it was not fair to disqualify appellant's bid because of the meaning of a similar nature. The appellant submitted what was considered to be the relevant references on layer three switches that are after all different from layer two switches, and its

offer was cheaper than that of the preferred bidder.

Mr Franco Costa, replying to a question by the Chairman explained that the tender requested experience of a similar nature. The subject is network switch. Not a particular product was mentioned. Appellant misunderstood this.

Mr Jason Cutajar on behalf of the preferred bidder said that the rejection of appellant's bid was through administrative non-compliance and this is now being pushed aside and the technical specifications are being discussed.

At this point the hearing was brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 19th December 2013 and also through Appellant's verbal submissions during the hearing held on 6th February 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant contends that his offer was unfairly discarded on a 'non administratively basis' compliance. The particular reference of default was the 'experience clause' as stipulated in the tender document.**
- b) Appellant also contends that his bid was technically compliant and cheaper than that of the preferred Bidder. Although he did not satisfy the experience criteria over the years 2011 and 2012, Appellant did comply with the required criteria in 2013.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 6th February 2014, in that:

- a) With regards to experience, Appellant could have included the deliveries of services and or similar products affected in 2011 and 2012.**
- b) The Contracting Authority contended that if and when in doubt, Appellant could have asked for clarifications prior to submission of the tender document.**

Reached the following conclusions:

- 1. The Tender document was clear enough in dictating the 'Experience Clause' required regarding the technical capacity and past performance of the tenderer's deliveries of similar works and products carried out during the years 2011, 2012 and 2013. In this respect, the Appellant failed to deliver.**
- 2. This Board opines that works or products of a similar nature refer to works or products related to the normal trading activity of the tenderer's commercial**

venture. In this regard, Appellant failed to submit data of deliveries affected during the years 2011 and 2012.

- 3. This Board also opines that Appellant Company had every opportunity to seek clarifications prior to submission of the tender document. Appellant did not avail himself of this concession.**
- 4. Although, Appellant's Bid was cheaper than that of the preferred bidder, same offer did not conform to the conditions as laid out in the tender document. Conditions dictated in the tender document must be strictly adhered to.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr Lawrence Ancillieri
Member

13 March 2014