

PUBLIC CONTRACTS REVIEW BOARD

Case No. 359

CT/3097/2010

Tender for the Supply and Installation of Electrical Lighting at Dockyard Creek, Cospicua, Malta

This call for tenders was published in the Government Gazette on 1st April 2011. The closing date for offers was 12th May 2011.

The estimated value of this tender was €500,000.

Four (4) tenderers submitted their offers.

C. Fino & Sons Ltd filed an objection on 8 October 2011 against the decisions taken by the Contracts Department that its offer was not technically compliant.

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 Tuesday, 20th December 2011 to discuss this objection.

Present for the hearing were:

C. Fino & Sons Ltd

Dr Henry Antoncich	Legal Representative
Mr Wallace Fino	Representative
Mr Stephen Casha	Representative
Ing. Johann Aloisio	Representative

Raymond Vella & Co. Ltd

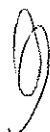
Dr Reuben Farrugia	Legal Representative
Mr Raymond Vella	Representative
Mr Peter Cutajar	Prepresentative
Mr Alexei Sciberras	Representative

Central Power Installations Ltd

Dr Kenneth Grima	Legal Representative
Mr Dimitri Pechenkin	Representative
Mr Jesmond Farrugia	Representative
Mr Oliver Pace	Representative

Ministry for Infrastructure, Transport and Communications

Dr Christian Falzon Scerri	Legal Adviser
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Adujdicating Board

Mr Hector Chetcuti	Chairman
Ms Henriette Calleja	Member
Mr Damian Vella Lenicker	Member
Mr Andrei Cachia	Member
Mr Michael Bonanno	Secretary

A P Malta Ltd (Architecture Project) – Consulting Firm engaged by Government on Whole Project

Architect David Drago	Partner
Mr Frank Franjou	Lighting engineer – adviser to adj. board
Mr Ronald Vella	Electrical engineer – adviser to adj. board
Mr Rune Jakobsen	Architect/Designer – adviser to adj. Board (not present)



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

Dr Henry Antoncich, legal representative of C. Fino & Sons Ltd, the appellant company, made the following submissions:

- i. by letter dated 30th September 2011 his client was informed by the Contracts Department that the company's offer was found to be technically not compliant because:

"The bidder did not submit various items of the Bill of Quantities, which include, L1, P2, LH, C1, C4 and 5, WFL, UL, FR, CB and EW; and

All the remaining items for which information had been submitted, were found to be non compliant";

- ii. he contended that, contrary to what the contracting authority stated, his client had, in fact, submitted all the items included in the bill of quantities and, as a consequence, he reckoned that there must have been a mistake on the part of the contracting authority in arriving at its decision;
- iii. referred to clause 7 of Volume 3 – Technical Specifications – (page 47) which, among other things, stated that:
 - a. *"The scope of the drawings and specifications in the Appendices is to give an indication of what is more or less required and prospective tenderers are at liberty to submit offers for various types of equipment from different suppliers so long as the general aesthetic considerations, the type and quality of the materials and the lamps shown in the Appendices are respected.*
- iv. argued that the specifications were therefore meant to guide the tenderer as to what, more or less, was required and, in that regard, he claimed that his client was compliant within the technical parameters set out in the tender document.

Dr Christian Falzon Scerri, representing the Ministry for Infrastructure, Transport and Communications, the contracting entity, made the following counter submissions:-

- a. clause 7 of the Technical Specifications afforded bidders a degree of discretion but certainly not a complete freehand so much so that it was conditional to the items offered respecting the general aesthetic together with the type and quality of the materials and of the lamps shown in the appendices;
- b. with regard to the first reason for the disqualification of the offer by C. Fino & Sons Ltd, it had to be clarified that the items were in fact submitted as per bill of quantities but the problem arose with regard to the corresponding technical literature;

- c. evidence was going to be produced that certain items fell well beyond the margin of discretion given to bidders;
- d. besides, the index linking the items in the bills of quantities to the technical literature was not submitted as had been requested in Volume 3, clause 11 – Technical Literature – which provided as follows:-

“Technical literature featuring the following equipment offered must be included with the offer to enable the adjudication board to understand exactly what is being offered. The offer may not be considered to be complete if the information below is not included.

If pages from catalogues showing various types of equipment are submitted it is very important to highlight what is being offered exactly. Moreover the information is to be included in a dedicated folder which should be indexed in accordance with the list below.

- i. the distribution boards DBs;*
- ii. the Main Lighting Control Units MLCU;*
- iii. the IP6 8 jointing/branching off boxes for the cables;*
- iv. the two types of supply cables;*
- v. all types of luminaires to be used in the project and method of mounting of each type of luminaire showing in particular the method proposed for leading the supply cables into the luminaires. The literature submitted for each luminaire must indicate the reference type of luminaire corresponding with references used in Appendix I;*
- vi. the 24V power supplies and relative IP68 boxes in which it is proposed to install them;*
- vii. details of the poles with luminaires including dimensions and materials and showing details of how the luminaires are secured to the poles;*
- viii. drawings showing the proposed method for installing the poles and particularly the method proposed for leading the supply cables into the poles;*
- ix. fuse holders to be installed inside the poles.”*


Dr Antoncich, pointed out that the letter of rejection referred to the non-submission of items and not to the non-submission of the index or relative literature.

Ing. Johann Aloisio, also representing C. Fino & Sons Ltd, declared that all the items and all the relative technical literature had in fact been submitted, for example, item L1 was to be found at page 24 of the bill of quantities and the relative literature was to be found along with the other brochures in a separate folder. He conceded that the index was not submitted but, on the other hand, he insisted that all the items and relative prices in the bill of quantities were submitted in a folder and the technical literature of each item was submitted in a separate folder in a consecutive manner;

Mr Hector Chetcuti, chairman of the adjudicating board, under oath, gave the following evidence:-

- i. he confirmed that whilst C. Fino & Sons Ltd had, in fact, submitted the items in the bill of quantities, yet, certain documentation had not been submitted;
 - ii. the tender document contained a 'Drawing Register' of all the items required and the relative drawing copies were provided in soft form (pages 62 and 63);
 - iii. although C. Fino & Sons Ltd did submit the items and the technical literature in two different folders the company failed to submit the index in accordance with the list provided in the tender document at Volume 3 'Technical Specifications' clause 11 'Technical Literature' to enable the adjudication board to understand clearly what was being offered;
 - iv. the adjudicating board had attempted to make a cross reference of its own but in the course of the exercise it turned out that it was unable to draw up this index;
 - v. although in this case one might be tempted to apply note 3 to clause 16 (page 10), namely a clarification on the information already submitted – the items and the technical literature – yet, the adjudication board considered the index as a separate mandatory document requested in the tender document and, as a result, the bidder could not be asked to submit it at tender evaluation stage since the submission of additional documentation/information with regard to technical specifications, literature and samples would amount to a rectification as per same note 3 to clause 16;
 - vi. since he was not a technical person he could not vouch that the items presented in the bill of quantities corresponded with the technical literature submitted in the separate folder, especially in the absence of the requested index;
 - vii. albeit none of the members sitting on the adjudicating board was competent to, technically, evaluate the electrical items, yet the evaluation board was assisted in this task by three experts, namely Mr Frank Franjou, lighting engineer, Mr Ronald Vella, electrical engineer, and Mr Rune Jakobsen, architect/designer, and all three of them had filled in and signed the confidentiality and impartiality form;
 - viii. government had engaged consulting firm A P Malta Ltd (Architecture Project) to advice and to provide technical support on the whole project and, as a result, the contracting authority assigned members of this consulting firm to advise it on the evaluation of this tender;
- and
- ix. the technical advisers had gone through the 34 items requested in the tender and then submitted their findings to the adjudicating board.

At this point the Chairman Public Contracts Review Board intervened to criticise the fact that none of the members of the adjudicating board was technically qualified to



evaluate the tender such that it had to rest entirely on the advice of technical experts who were extraneous to the board.

Dr Antoncich raised the following concerns (a) whether in public procurement terms it was regular for a tender involving technical aspects to be evaluated by an adjudicating board whose members were not technically competent in the sector and (b) since the external consultants were apparently involved in the drawing up of the tender specifications it was questionable whether they could also carry out the technical evaluation of the same tender.

The appellant company's legal advisor then asked the Public Contracts Review Board to decide, in the first instance, on whether it was admissible for the adjudicating board, as composed, to carry out the evaluation of this tender.

Mr Chetcuti recalled that, at the administrative evaluation stage, the adjudicating board had noted that the index requested at Volume 1 section 4 had not been submitted and that the experts' attempts to draw up an index from the information given had proved fruitless.

The Chairman Public Contracts Review Board remarked that it was fair enough for the tender specifications to be drawn up by consultants supervising the whole project but it was not desirable to have the same consultants evaluate the tender. He added that the Public Contracts Review Board was not comfortable to ask questions to the adjudicating board conscious that none of its members were competent to offer a reply from the technical point of view.

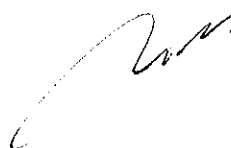
Mr Frank Franjou, lighting engineer and adviser to the adjudicating board, under oath, confirmed that (a) items L1 *luminaires* with 17xLED *light source* (38 in no.) and C1 *luminaires* with 12x1W LED *light source* (13 in no.) (page 24) had been submitted, and this notwithstanding that, in the letter of rejection dated 30th July 2011, these items were referred to as 'not submitted', (b) the index relating to the items in the bill of quantities to the technical literature had not been submitted by the appellant company.

Mr Chetcuti remarked that the non-compliance concerned the tender submission as a whole and it did not refer to specific items. He added that the main items of this tender were the *luminaires*.

Ing. Aloisio remarked that the reason for exclusion given by the Department of Contracts, that C. Fino & Sons Ltd did not submit 11 items and was non-compliant with regard to all the other remaining items, was unacceptable because all the items and relative information had been duly submitted as requested.

Dr Kenneth Grima, legal representative of the recommended tenderer, made the following counter submissions:-

- i. it was not acceptable to cancel the tender simply because the appellant company was declared non-compliant;



- ii. all the cases brought before the Public Contracts Appeals Board / Public Contracts Review Board concerned non-compliance at some stage of the tendering process;
- iii. it has invariably been the rule that tenderers who failed to submit mandatory tender requirements had to be excluded irrespective of the price difference and any such other considerations;
- iv. it was up to the tenderer to submit a complete and compliant tender submission and the adjudication board should not be expected to undertake laborious exercises to extract information from here and there when, in the first place, that document /information had been requested from the tenderers;
- v. non-compliance did not necessarily imply incompetence on the part of the tenderer but most of the times it concerned the omission of mandatory information and the non-submission of one single mandatory item was enough to lead to exclusion;
- vi. in this case, C. Fino & Sons Ltd, admittedly, failed to submit the index referred to in page 51 of the tender document which stated, among other things, that “... *the information is to be included in a dedicated folder, which should be indexed in accordance ...*”
- vii. there was no irregularity, whatsoever, if an adjudicating board engaged independent experts to assist it in its evaluation since one did not expect each and every entity to possess in-house expertise in every sector, especially in a small country like ours, not to mention that private experts provided their services to various contractors/operators;
- viii. it was not fair to denigrate the contracting authority for having engaged on the evaluation of one aspect of the project the same consultants that it had engaged on the supervision of the entire project - if anything, that should have led to synergy between planning and execution;

and

- ix. even the courts appointed experts to assist it in its work on specialised matters.

Ms Henriette Calleja, a member of the adjudicating board, remarked that although the board had the report of the experts at its disposal, in some instances, it did not take an expert to conclude that a document was missing or that a technical requirement had not been met.

The Public Contracts Review Board noted that the adjudicating board had failed to include certain clear reasons for non-compliance and, as a consequence, these were not communicated to the appellant company.

Dr Antoncich reiterated that prior to going into the technical details of each and every item one had to establish in the first instance whether the adjudicating board was regularly composed. He pointed out that whilst the adjudicating board did seek a



clarification from his client with regard to certain issues, yet it refrained from asking about the index.

Ing. Aloisio insisted that all the items had been submitted along with the technical data and all that was required was for one to match the item with the brochure;

Dr Falzon Scerri made the following concluding remarks:-

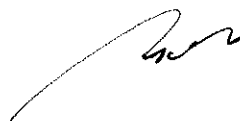
- a. the regulations did not provide that the members of the adjudicating board had to be in possession of any particular qualification/s and neither did they preclude the adjudicating board from engaging experts to assist it in the evaluation process;
 - b. one had to draw a clear distinction between a board which had an administrative function, like an adjudicating board, from a *quasi* judiciary board, like the Public Contracts Review Board;
 - c. in the latter case the deciding body could discard the expert advice but it had to give cogent reasons for doing so whereas, in the case of an adjudicating board, all that it had to do was to establish if the tenderers had met the tender conditions and specifications and it was free to seek expert advice to that end;
 - d. in this case there was absolutely nothing irregular when the adjudicating board shared the conclusions reached by the experts although it could well have discarded them;
 - e. similarly, there was nothing irregular in the engagement of these experts who were also overseeing the implementation of the whole project, if anything, that was a plus, and it was not a case on 'one having been a judge in his own cause' so much so that the contract was issued by the Ministry for Infrastructure, Transport and Communications and it was being adjudicated by the Ministry for Infrastructure, Transport and Communications as was the norm;
 - f. in certain instances, namely the missing index or a lamp having half the wattage that was requested instead, it did not take an expert to come to the logical conclusion;
- and
- g. a clarification referred to a situation where an adjudicating board needed to understand more clearly certain points of a document which had been submitted whereas the submission of a missing document or the submission of additional information represented a rectification to the original tender submission.

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 8 October 2011 and through the verbal submissions made during the hearing held on the 20th December 2011, had objected against the decisions taken by the Contracts Department that its offer was not technically compliant;
- having noted the appellant firm's representatives' claims and observations regarding the fact that (a) by letter dated 30th September 2011 the appellant company was informed by the Contracts Department that its offer was found to be technically not compliant, (b) contrary to what the contracting authority stated, the appellant company had, in fact, submitted all the items included in the bill of quantities and, as a consequence, one reckoned that there must have been a mistake on the part of the contracting authority in arriving at its decision, (c) the specifications were meant to guide the tenderer as to what, more or less, was required and, in that regard, the appellant company was compliant within the technical parameters set out in the tender document, (d) the letter of rejection referred to the non-submission of items and not to the non-submission of the index or relative literature, (e) all the items and all the relative technical literature had in fact been submitted, for example, item L1 was to be found at page 24 of the bill of quantities and the relative literature was to be found along with the other brochures in a separate folder, (f) whilst conceding that the index was not submitted yet, on the other hand, all the items and relative prices in the bill of quantities were submitted in a folder and the technical literature of each item was submitted in a separate folder in a consecutive manner, (g) one should query whether in public procurement terms it was regular for a tender involving technical aspects to be evaluated by an adjudicating board whose members were not technically competent in the sector and (h) since the external consultants were apparently involved in the drawing up of the tender specifications it was questionable whether they could also carry out the technical evaluation of the same tender;
- having considered the contracting authority's representative's submissions, namely that (a) clause 7 of the Technical Specifications afforded bidders a degree of discretion but certainly not a complete freehand so much so that it was conditional to the items offered respecting the general aesthetic together with the type and quality of the materials and of the lamps shown in the appendices, (b) with regard to the first reason for the disqualification of the offer by C. Fino & Sons Ltd, it had to be clarified that the items were in fact submitted as per bill of quantities but the problem arose with regard to the corresponding technical literature, (c) certain items fell well beyond the margin of discretion given to bidders, (d) the index linking the items in the bills of quantities to the technical literature was not submitted as had been requested in Volume 3, clause 11 – Technical Literature, (e) whilst C. Fino & Sons Ltd had, in fact, submitted the items in the bill of quantities, yet, certain documentation had not been submitted, (f) the tender document contained a 'Drawing Register' of all the items required and the relative drawing copies were provided in soft form (pages 62 and 63), (g) although C. Fino & Sons Ltd did submit the items and the technical literature in two different folders the company failed to submit the index in accordance with the list provided in the tender document at Volume 3 'Technical Specifications'



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- having also considered the recommended tenderer's representative's submissions namely that (a) it was not acceptable to cancel the tender simply because the appellant company was declared non-compliant, (b) all the cases brought before the Public Contracts Appeals Board / Public Contracts Review Board concerned non-compliance at some stage of the tendering process, (c) it has invariably been the rule that tenderers who failed to submit mandatory tender requirements had to be excluded irrespective of the price difference and any such other considerations, (d) it was up to the tenderer to submit a complete and compliant tender submission and the adjudication board should not be expected to undertake laborious exercises to extract information from here and there when, in the first place, that document /information had been requested from the tenderers, (e) non-compliance did not necessarily imply incompetence on the part of the tenderer but most of the times it concerned the omission of mandatory information and the non-submission

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reached the following conclusions:

1. The Public Contracts Review Board opines that, in the interest of both justice and transparency, all unsuccessful bidders in a public call for tenders should be informed in detail where their bids were found to be non compliant. Undoubtedly, in the absence of such information being provided, tenderers may find it difficult to build a case when filing an appeal following them feeling aggrieved by some decision taken at evaluation / adjudication stage. The Public Contracts Review Board argues that although it is admissible for the Evaluation committee to use the services of consultants in evaluating bids, any reasons given by the said consultants for disqualifying bidders should be incorporated in the evaluation report and eventually transmitted to the bidders as the reason for their disqualification.
2. The Public Contracts Review Board feels that, in the present case, the reasons given in the evaluation report for the non-compliance by the appellant company were, to say the least, defective. It resulted during the hearing that, while the report stated that this bidder did not submit various items, in fact, it meant that the said company did not submit the relative documentation. This Board opines that it is not enough for evaluation board members to later state that "the non-compliance concerned the tender submission as a whole and it did not refer to specific items" when the report states, *inter alia*, that all "the remaining items were found to be non-compliant".
3. The Public Contracts Review Board understands that though the technical information submitted by the appellant company was in a dedicated folder as required by the tender document, admittedly this was not accompanied by the required index.
4. The Public Contracts Review Board contends that though it is the normal practice for a competent authority to engage the services of technical consultants when such expertise was lacking in-house, in order to ensure a transparent process, the drawing up of technical specifications and the adjudicating of tenderers' submissions should be kept completely separate. Moreover, it was not proper for adjudicating boards not to have at least one person who was knowledgeable in the matter being adjudicated so that he/she

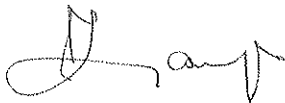


may be in a position to form an informed opinion, independent of any consultants.

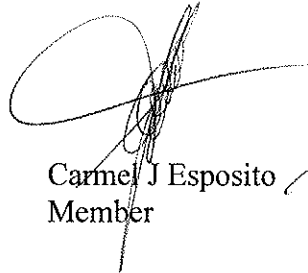
5. The Public Contracts Review Board argues that it was still possible with a little effort for the Adjudicating Board to reach a conclusion on the compliance or otherwise of the products on offer since the technical documentation was filed in accordance with the BOQ.
6. The Public Contracts Review Board contends that the adjudication process or rather the evaluation report was thus flawed.

In view of the above, this Board finds in favour of the appellant company and recommends that the tender be re-issued and an appropriate adjudicating board set up, which would have on board the technical ability to arrive at an educated conclusion.

This Board also recommends that the deposit paid by the appellant company should be reimbursed.



Alfred R Triganza
Chairman



Carmel J Esposito
Member



Joseph Croker
Member

30 January 2012