

PUBLIC CONTRACTS REVIEW BOARD

Case No. 360

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.

Raymond Vella & Co. Ltd filed an objection on 10th October 2011 against the decisions taken by the Contracts Department that its offer was not technically compliant and to award the tender to Central Power Installations Ltd.

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:

Raymond Vella & Co. Ltd

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

C. Fino & Sons Ltd

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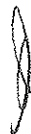


Adujdicating Board

Mr Hector Chetcuti	Chairman
Ms Henriette Calleja	Member
Mr Damien Vella Linecker	Member
Mr Andrei Cachia	Member
Mr Michael Bonanno	Secretary

A P Malta Ltd (Architecture Project) - Firm consulting Government on 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 Reuben Farrugia, legal representative of Raymond Vella & Co Ltd, the appellant company, made the following submissions:

- i. by letter dated 30th September 2011 the Contracts Department informed his client that the company's offer was found to be, technically, not compliant since only the following ten items were found compliant, namely L1, B2, P2, LH, WFL, C4, LDB, UL, FR, and LDL whereas all the remaining items were non-compliant;
- ii. reference was made to clause 7 of Volume 3 – Technical Specifications – (page 47) which stated, among other things, that:

“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.”

- iii. 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 and that his client had even submitted the cheapest compliant tender.

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. evidence was going to be produced that certain items fell well beyond the margin of discretion given to bidders

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

- i. according to note 3 to clause 16 (page 10), at tender evaluation stage, the bidder could not be asked to submit mandatory documentation/information with regard to technical specifications, literature and samples that the said bidder should have submitted in the original tender submission as that would amount to a rectification rather than a clarification;
- ii. 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;

- i. 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

- ii. 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 Farrugia raised the following issues:-

- 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 particular sector;
- b. evidently, the adjudicating board members were not competent to answer the technical questions that he wished to pose and, probably, the adjudicating board would ask him to direct his queries to the consultants;

and

- c. if the external consultants were also involved in the drawing up of the tender specifications, was it desirable and/or regular for them to carry out the technical evaluation of the same tender.

Dr Farrugia therefore (a) 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 and, (b) if the answer would be in the negative, to consider the cancellation of this tendering process and the re-issue of the call for tenders.

Dr Farrugia declared that a preliminary decision was called for prior to entering into the details of the tender submissions of the participating tenderers which, up to that stage, were only available to the adjudicating board, their consultants and the Public Contracts Review Board.

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, stated that certain shortcomings were detected, e.g. with regard to item B4 luminaires with 70W HIT lamp (23 in no.), the appelland company submitted a 35W HIT lamp.

Dr Farrugia replied that, with regard to items B2, B3 and B4, his client had inserted a note in the data sheet which read as follows ... "it is to be noted that the manufacturer shall provide the specifications as requested in the tender and this applies both for the dimension and the wattage."

Dr Farrugia then referred to item Y6101 '3 core HO7RN-Fcable...' which he insisted was compliant - contrary to what had been stated in the letter of rejection - namely, one of the items was declared non-compliant.

Mr Chetcuti remarked that the non-compliance concerned the tender submission as a whole and it did not, specifically, refer to the cables, because all tenderers had submitted technically compliant cables. Mr Chetcuti stressed that the main items of the tender were the *luminaires*.

Mr Ronald Vella, electrical engineer and adviser to the adjudicating board, confirmed that all the cables were found to be compliant.

The Chairman Public Contracts Review Board pointed out that, according to the letter of rejection, dated 30 September 2011, Messrs Raymond Vella & Co Ltd was compliant with regard to 10 items and non-compliant on all the rest, i.e. including the cables. He added that, in that letter, the Contracts Department had, faithfully, reproduced what had been declared in the evaluation report dated 23rd September 2011.

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 appelland 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. the tender document clearly requested that item B4 had to be luminaires with 70W HIT lamp (23 in no.) whereas Raymond Vella & Co Ltd, the appellant, provided 35W HIT lamps, when the contracting authority had just stated that the luminaires were the main item of the tender;
 - 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 (same) 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, for example, if one were to accept 35W lamps instead of 70W lamps that would either leave the area not properly illuminated or one would have to erect additional poles for additional lamps with all that it involved.

The Public Contracts Review Board noted that certain clear reasons for non-compliance were not listed in the evaluation report and consequently they were not communicated to the appellant.

Dr Farrugia remarked that public procurement meant dealing with public funds and that the Public Contracts Review Board's main concern related to matters which referred to procedural issues. He reiterated that the adjudicating board was not technically competent to evaluate this tender so much so that it had to engage third party experts who were also involved in the drawing up of the tender specifications. Dr Farrugia pointed out that it had emerged at the hearing that the sweeping statement made in the evaluation report that his client was practically not compliant on all items was incorrect so much so that all cabling items were, in fact, compliant.

Dr Kenneth Grima made it clear that non-compliance on one mandatory requirement was enough to exclude a bidder.

Dr Falzon Scerri made the following concluding remarks:-


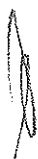


- a. the regulations did not provide that the members of the adjudicating board had to be in possession of any particular qualification/s and neither did they preclude the adjudicating board from engaging experts to assist it in the evaluation process;
 - b. one had to draw a clear distinction between 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 provision of 35W lamps instead of a 70W lamps, 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.

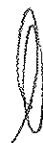
This Board,

- having noted that the appellant company, in terms of the reasoned letter of objection dated 17th 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 and to award the tender to Central Power Installations Ltd;
- having noted the appellant firm's representatives' claims and observations regarding the fact that (a) by letter dated 30th September 2011 the Contracts Department informed his client that the company's offer was found to be,



technically, not compliant since only the following ten items were found compliant, namely L1, B2, P2, LH, WFL, C4, LDB, UL, FR, and LDL whereas all the remaining items were non-compliant, (b) 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 and that the company had even submitted the cheapest compliant tender, (c) one should query whether 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 particular sector, (d) if the external consultants were also involved in the drawing up of the tender specifications, was it desirable and/or regular for them to carry out the technical evaluation of the same tender, (e) with regard to items B2, B3 and B4, the appellant company had inserted a note in the data sheet which read as follows ... "it is to be noted that the manufacturer shall provide the specifications as requested in the tender and this applies both for the dimension and the wattage", (f) contrary to what had been stated in the letter of rejection item Y6101 '3 core HO7RN-Fcable...' was compliant, (g) public procurement meant dealing with public funds and that the Public Contracts Review Board's main concern related to matters which referred to procedural issues and (h) during the hearing it had emerged that the sweeping statement made in the evaluation report that the appellant's bid was practically not compliant on all items was incorrect so much so that all cabling items were, in fact, compliant;

- 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) according to note 3 to clause 16 (page 10), at tender evaluation stage, the bidder could not be asked to submit mandatory documentation/information with regard to technical specifications, literature and samples that the said bidder should have submitted in the original tender submission as that would amount to a rectification rather than a clarification, (c) 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, (d) government had engaged consulting firm A P Malta Ltd (Architecture Project) to advise 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, (e) the technical advisers had gone through the 34 items requested in the tender and then submitted their findings to the adjudicating board, (f) certain shortcomings were detected, e.g. with regard to item B4 luminaires with 70W HIT lamp (23 in no.), the appellant company submitted a 35W HIT lamp, (g) the non-compliance concerned the tender submission as a whole and it did not, specifically, refer to the cables, because all tenderers had submitted technically compliant cables, (h) although the board had the report of the experts at its disposal, in some instances, it did not take an expert to conclude that, for example, if one were to accept 35W lamps instead of 70W lamps that would either leave the area not properly illuminated or one would have to erect additional poles for additional lamps with all that it involved, (i) 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, (j) 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 and (k) 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;

- 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 of one single mandatory item was enough to lead to exclusion, (f) 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 ...*", (g) 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, (h) 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 (i) even the courts appointed experts to assist it in its work on specialised matters,

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.



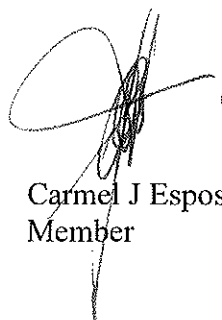
2. The Public Contracts Review Board feels that it is not enough for evaluation board members to later state that the non-compliance concerned the tender submission as a whole and it did not, specifically, refer to the cables, because all tenderers had submitted technically compliant cables.
3. The Public 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 recommended 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.
4. The Public Contracts Review Board opines that it was manifestly clear that the tender document provided a degree of discretion and as a result tenderers were free to present their own interpretation of the tender requirements.
5. The Public Contracts Review Board feels that the appellant company has submitted enough evidence to show that offer submitted by the said company was made in accordance with the tender document.

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