

PUBLIC CONTRACTS REVIEW BOARD

Case No. 386

UM 1592

Tender for the Design, Supply and Laying of Hard Wearing Epoxy Resin Flooring for the Anatomy Department – University of Malta

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 € 32,076.27 was the 31st August 2011.

Four (4) tenderers submitted their offers – eight (8) options.

Messrs Coleiro Yacht Finishes Ltd filed an objection on 11th November 2011 against the decisions of the University of Malta to disqualify its offer as administratively non-compliant and to recommend the award of the tender to De Valier Ltd (Option C).

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 Wednesday, 14th March 2012 to discuss this objection.

Present for the hearing were:

Coleiro Yacht Finishes Ltd

Mr Simon Bonello General Manager

De Valier Ltd

Mr Mario Cassar Representative

University of Malta (UoM)

Dr Oriella De Giovanni Legal Representative

Evaluation Board

Mr Tonio Mallia Chairman
Mr Elton Baldacchino Secretary



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

Mr Simon Bonello, representing Coleiro Yacht Finishes Ltd, the appellant company, remarked that the contracting authority had communicated by email dated 4th November 2011 that the two options submitted by his company were found to be administratively non-compliant because (i) samples as specified in the tender document (Volume 1 Section 4 – Tenderer's Statement - 3 Literature/List of Samples) were not submitted and (ii) a separate tender form for each option was not submitted.

A. Samples

Mr Bonello stated that Coleiro Yacht Finishes Ltd had submitted the samples requested so much so that even a receipt had been issued to this effect, a copy of which he had attached to the letter of objection.

Dr Oriella De Giovanni, legal representative of the University of Malta, the contracting authority, conceded that the non-submission of the samples was not an issue because the appellant company had, in fact, presented the samples requested even though these were erroneously delivered to the University's Estates and Works Department.

B. Tender Form

Mr Bonello made the following submissions:-

- i. at tender submission stage there was a misinterpretation of the tender document provisions on their part in the sense that, whereas section 7 made it clear that only one tender per tenderer was allowed, a tenderer could submit more than one option. Mr Bonello stated that, unfortunately, the person who filled in the *form* apparently failed to note the instruction that a distinct 'tender form' had to be provided for each option – note at page 17 of the 'tender form' under the heading – Volume 1 Section 2 – Tender Form;
- ii. it was correct that they had submitted one 'tender form' but it was equally correct that on the 'tender form' the two options 'A' and 'B' were distinctly indicated each with its own price, i.e. €11,175 and €14,125 respectively, and with separate bills;
- iii. given the nature of the shortcoming, the contracting authority could have asked Coleiro Yacht Finishes Ltd to rectify this administrative matter as provided for in clause 16 of the 'Instructions to Tenderers';

and
- iv. the exclusion of both their offers from the tendering process was considered unfair given that all the necessary information was submitted and was clearly presented to the contracting authority, not to mention that the offers were about €7,000 and €4,000 cheaper than the recommended bid.

Mr Tonio Mallia, chairman of the adjudicating board, remarked that, according to clause 11 (f) note 3 of the 'tender form', no rectification was allowed to 'tender form'.

Dr De Giovanni pointed out that, from the legal point of view, separate 'tender forms' had to be submitted and the appellant company did not adhere to that instruction, when the same instruction was quite clear to the other tenderers since they did submit a 'tender form' for each option.

Mr Mario Cassar, representing the recommended tenderer, pointed out that the 'tender form' was a mandatory requirement and that no rectification was permissible in that regard.

The Chairman of the Public Contracts Review Board made the following observations:-

- a. apparently, the appellant company failed to distinguish between the provisions that requested only one tender per tenderer and a separate 'tender form' for each option submitted;
 - b. it was clear in the tender document that the bidder had to submit a separate 'tender form' for each option and therefore the adjudicating board acted correctly when it noted that the appellant company did not abide by those instructions;
 - c. on the other hand, from a pragmatic point of view, one could not fail to note that on page 18 of the appellant company's 'tender form' the latter had clearly indicated the company's two options and that elsewhere in its tender submission, e.g. the summary and the rates, the two options were presented separately;
- and
- d. therefore, what the Public Contracts Review Board had to deliberate upon was, on the one hand, the non-submission of a separate 'tender form' for each option and, on the other hand, the appellant company's presentation of its two options in a distinctly separate manner so much so that, even in its evaluation report, the adjudicating board was in a position to account for the two options separately.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 7th November 2011 and also through their verbal submissions presented during the hearing held on the 14th March 2012, had objected against the decisions of the University of Malta to disqualify its offer as administratively non-compliant and to recommend the award of the tender to De Valier Ltd (Option C);
- having noted all of the appellant's representatives' claims and observations, particularly, the references made to the fact that (a) the contracting authority had communicated by email dated 4th November 2011 that the two options submitted by the appellant company were found to be administratively non-compliant because (1) samples as specified in the tender document (Volume 1 Section 4 – Tenderer's



Statement - 3 Literature/List of Samples) were not submitted and (2) a separate tender form for each option was not submitted, (b) Coleiro Yacht Finishes Ltd had submitted the samples requested so much so that even a receipt had been issued to this effect, a copy of which he had attached to the letter of objection, (c) at tender submission stage there was a misinterpretation of the tender document provisions on their part in the sense that, whereas whilst section 7 made it clear that only one tender per tenderer was allowed, a tenderer could submit more than one option, unfortunately, the person who filled in the *form* apparently failed to note the instruction that a distinct 'tender form' had to be provided for each option – note at page 17 of the 'tender form' under the heading – Volume 1 Section 2 – Tender Form, (d) it was correct that they had submitted one 'tender form' but it was equally correct that on the 'tender form' the two options 'A' and 'B' were distinctly indicated each with its own price, i.e. €11,175 and €14,125 respectively, and with separate bills, (e) given the nature of the shortcoming, the contracting authority could have asked Coleiro Yacht Finishes Ltd to rectify this administrative matter as provided for in clause 16 of the 'Instructions to Tenderers' and (f) the exclusion of both their offers from the tendering process was considered unfair given that all the necessary information was submitted and was clearly presented to the contracting authority;

- having considered the contracting authority's representative's reference to the fact that (a) the University of Malta, the contracting authority, conceded that the non-submission of the samples was not an issue because the appellant company had, in fact, presented the samples requested even though these were erroneously delivered to the Estates and Works Department of the Ministry for Resources and Rural Affairs, (b) according to clause 11 (f) note 3 of the 'tender form', no rectification was allowed to 'tender form' and (c) from the legal point of view, separate 'tender forms' had to be submitted and the appellant company did not adhere to that instruction, when the same instruction was quite clear to the other tenderers since they did submit a 'tender form' for each option
- having also considered the recommended tenderer's representative's reference to the fact that the 'tender form' was a mandatory requirement and that no rectification was permissible in that regard,

reached the following conclusions, namely:

1. The Public Contracts Review Board is somewhat concerned as to the need for a contracting authority to stipulate that a tenderer is not allowed to submit more than one tender but, at the same time, a tenderer is allowed to submit various options.
2. The Public Contracts Review Board acknowledges that with regard to the initial claim that had been made by the contracting authority as to the non submission of samples by the appellant company this was resolved in favour of the latter.
3. The Public Contracts Review Board opines that there was ample proof that the appellant company was submitting two options as was, as a matter of fact, the fact that even the evaluation report reflected this. In this instance, bearing in mind that one 'tender form' was submitted by the appellant company this Board feels that the adjudication board could have taken the said 'tender form' as submitted by the appellant company as referring to the lowest eligible offer and, possibly, judged the

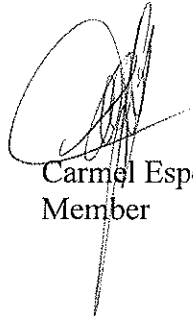
more expensive option as the option not supported by the mandatory 'tender form'. This Board cannot see the point in both options being rejected when the 'tender form', as submitted, was administratively correct in so far as, at least, one option.

In view of the above this Board finds in favour of the appellant company and recommends that the deposit paid by the latter should be reimbursed and that the appellant company's tender submission should be reintegrated in the evaluation process.



Alfred R Triganza
Chairman

20 March 2012



Carmel Esposito
Member



Joseph Croker
Member