

PUBLIC CONTRACTS REVIEW BOARD

Case No. 444

MRRA/W/665/2011/2

Tender for Construction Works at the Kalkara Parish Church Parvis

This call for tenders was published in the Government Gazette on the 24th April 2012. The closing date for this call with an estimated budget of € 95,195 (excl. VAT) was the 8th May 2012.

Four (4) tenderers submitted their offers.

Mr Joseph Caruana filed an objection on the 4th June 2012 against the decision of the Ministry for Resources and Rural Affairs to disqualify his offer as non-complaint and to recommend award of the tender to Vaults Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Paul Mifsud as members convened a public hearing on Thursday, 9th August 2012 to discuss this objection.

Present for the hearing were:

Mr Joseph Caruana

Dr Mark Fenech Vella	Legal Representative
Architect George Farrugia	Representative

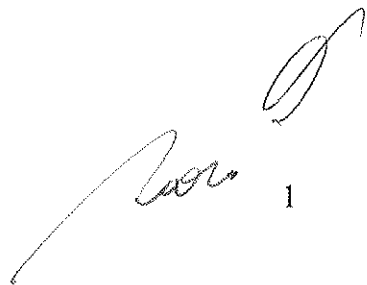
Vaults Ltd

Dr Alessandro Lia	Legal Representative
Mr Ivan Farrugia	Representative

Ministry for Resources and Rural Affairs

Evaluation Board

Mr Anton Camilleri	Chairman
Mr Oliver Debono	Member
Ms Josephine Muscat	Member



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

Dr Mark Fenech Vella, legal representative of Mr Joseph Caruana, the appellant, stated that by letter dated 28th May 2012 his client was informed that his offer had been disqualified for the non-submission of various documents.

A) Non-submission with the tender offer of any relevant Technical Literature/Catalogues/Illustrations relating to the light fittings to be utilised as per Clause 8.8.4 and that all documents provided should be written in the English language - Failure to comply with this Clause would render the offer null - Clause 1.2.10.

Dr Fenech Vella submitted that:-

- i. the clause number should read 1.2.12 and not 1.2.10;
 - ii. the tenderer was asked to submit 'any' relevant technical literature but was not specific in its request;
- and
- iii. his client had presented sufficient information in his original tender submission and he felt that there was no need to provide any other information by way of technical literature.

Mr Anton Camilleri, chairman of the evaluation board, after admitting that the clause in question should have read 1.2.12 went on to explain that:-

- a. the submission of relevant 'Technical Literature/Catalogues/Illustrations' relating to the light fittings was a mandatory requirement so much so that it was clearly indicated that failure to comply led to disqualification;
- b. the contracting authority requested this documentation so as to check the specifications and to visualise the product being offered and the bidder could not just opt to omit such information;
- c. in clause 1.2.12 the term 'any' in English might not have been the most appropriate because what the contracting authority had in mind was 'all kind of' (*kwalunkwe*) 'Technical Literature/Catalogues/Illustrations' and perhaps the term 'all' instead of 'any' might have been more suitable;
- d. light fittings and such other items were invariably accompanied by relative technical literature, catalogues and illustrations and their non-submission must have been an oversight on the part of the appellant;

and

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- e. the mandatory requirements at clause 1.2.12 were not among the items that the evaluation board could have asked for a rectification under the provisions of clause 2.1.3 of the tender document.

Architect George Farrugia, also representing the appellant, asked, that once the bidder had declared that he would abide by the tender specifications then, why should the tenderer be compelled to submit any other documentation.

The Chairman Public Contracts Review Board conceded that the use of the term 'any' in clause 1.2.12 was not appropriate but, then again, it should have occurred to the appellant that this information had to be provided since non-compliance led to disqualification and, as a result, the appellant should have acted logically by asking the contracting authority for a clarification.

B) Non-submission of details including Name and Licence Number of Nominated Electrician - Failure to comply would render the offer null - Clause 1.2.11


Dr Fenech Vella submitted that:-

- i. clause 1.2.11 was a mandatory requirement but, again, whilst reference was made to clause 8.7.17 b, which was inexistent, when it should have referred to clause 8.7.18.a 'Appointed Electrician' which requested the tenderer to indicate the details of the nominated licensed electrician in the appropriate space provided, yet no such space was provided in the tender document;
 - ii. albeit it was true that the particulars of the nominated electrician were not submitted by his client since no appropriate space was provided for this purpose, yet clause 2.1.3 provided that the evaluation committee should have requested rectifications within 2 days and upon the payment of a fee in certain instances, among them, in respect of non-submitted information requested in sub-clause 1.2.11;
- and
- iii. the contracting authority did not seek such a rectification from his client keeping in view also that his client submitted an offer cheaper than the recommended one.

Mr Camilleri, while conceding that the tender document did not provide the space where the bidder had to insert the electrician's details, remarked that the appellant could have sought a clarification or else submitted the details as an 'annex' as other bidders did. He admitted that clauses 1.2.11 and 2.1.3 were conflicting in the sense that the former stated that non-submission would have led to disqualification and the latter provided that the evaluation board could request a rectification thereon.

The Chairman Public Contracts Review Board remarked that, in the absence of no space having been provided for the electrician's details, the appellant had the opportunity to ask the contracting authority to clarify the issue or else the appellant

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could have provided it as an 'annex' to his tender submission. He added that, although there was an evident shortcoming on the part of the contracting authority, the bidder could not omit mandatory requirements as those requested at clause 1.2.11.

C) Non-submission of the original form to declare the Contractors Experience.

Dr Fenech Vella stated that whilst his client did submit the 'Experience as Contractor' form, yet it was not identical to the one provided in the tender document at page 33 but, in essence, the information required was there and, as a consequence, disqualification was considered a disproportionate measure.

The Public Contracts Review Board compared the form submitted by the appellant with that provided in the tender document and it resulted that, basically, two columns were missing in the version submitted by the appellant, namely 'the location including address where works were carried out' and the 'name and contact number of A&CE in charge'.

Architect Farrugia pointed out that, ultimately, the contracting authority retained the right to contact the clients of the bidder with a review to verify the bidder's experience and, for that purpose, his client had provided the 'client's contract'. He added that the information provided by the appellant in the tender submission gave a fair picture of his experience.

Mr Camilleri remarked that, although in his version of the list of past contracts provided by the appellant contained most of the information requested in the tender document form, the fact remained that the information requested in two columns was missing and the bidder could not alter the tender document.

The Chairman Public Contracts Review Board commented that the Board did consider substance over form but within limits because the information requested had to be provided in full.

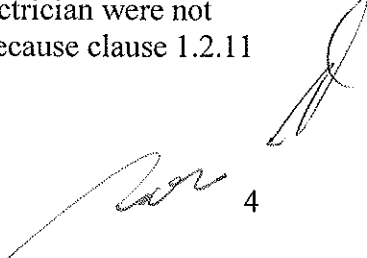
Dr Alessandro Lia, legal representative of Vaults Ltd, the recommended tenderer, submitted that:-

- a. contrary to what was claimed by the appellant, he could not omit the submission of the technical literature by assuming that he had already submitted sufficient technical information because the technical literature was a mandatory requirement which had to be provided in the first instance;

and

- b. the fact that the contracting authority quoted sub-clause 8.7.17 (b) instead of (a) in clause 1.2.11 - should have been quite discernible - and the non-provision of space where to put down the details of the electrician were not good enough to justify the non-submission of the details because clause 1.2.11 was quite clear in its requirement.

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At Dr Lia's request the Public Contracts Review Board checked the 'tender submission checklist' of the appellant and verified that the box corresponding to the 'technical literature' had not been ticked

The Chairman Public Contracts Review Board remarked that although the appellant's offer was the cheaper than the recommended offer still a bid qualified for financial consideration only if found technically compliant.

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 the 28th May 2012 and also through their verbal submissions presented during the hearing held on the 9th August 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant's representative's claims and observations, particularly, the references made to the fact that (a) the appellant was informed that his offer had been disqualified for the non-submission of various documents, (b) the clause number should have read 1.2.12 and not 1.2.10, (c) the tenderer was asked by the contracting authority to submit 'any' relevant technical literature but it was not specific in its request, (d) the appellant had presented sufficient information in his original tender submission and he felt that there was no need to provide any other information by way of technical literature, (e) once the bidder would have declared that he would abide by the tender specifications then there was no need for such tenderer to be compelled to submit any other documentation, (f) clause 1.2.11 was a mandatory requirement but, again, whilst reference was made to clause 8.7.17 b, which was inexistent, when it should have referred to clause 8.7.18.a 'Appointed Electrician' which requested the tenderer to indicate the details of the nominated licensed electrician in the appropriate space provided, yet no such space was provided in the tender document, (g) albeit it was true that the particulars of the nominated electrician were not submitted by the appellant since no appropriate space was provided for this purpose, yet clause 2.1.3 provided that the evaluation committee should have requested rectifications within 2 days and upon the payment of a fee in certain instances, among them, in respect of non-submitted information requested in sub-clause 1.2.11, (h) the contracting authority did not seek such a rectification from the appellant keeping in view also that the latter submitted an offer cheaper than the recommended one, (i) whilst the appellant did submit the 'Experience as Contractor' form, yet it was not identical to the one provided in the tender document at page 33 but, in essence, the information required was there and, as a consequence, disqualification was considered a disproportionate measure and (j) ultimately, the contracting authority retained the right to contact the clients of the bidder with a view to verify the bidder's experience and, for that purpose, the appellant had provided the 'client's contract';
- having considered the contracting authority's representative's reference to the fact that (a) the submission of relevant 'Technical Literature/Catalogues/Illustrations' relating to the light fittings was a mandatory requirement so much so that it was clearly indicated that failure to comply led to disqualification, (b) the contracting



authority requested this documentation so as to check the specifications and to visualise the product being offered and the bidder could not just opt to omit such information, (c) in clause 1.2.12 the term 'any' in English might not have been the most appropriate because what the contracting authority had in mind was 'all kind of' (*kwalunkwe*) 'Technical Literature/Catalogues/Illustrations' and perhaps the term 'all' instead of 'any' might have been more suitable, (d) light fittings and such other items were invariably accompanied by relative technical literature, catalogues and illustrations and their non-submission must have been an oversight on the part of the appellant, (e) the mandatory requirements at clause 1.2.12 were not among the items that the evaluation board could have asked for a rectification under the provisions of clause 2.1.3 of the tender document, (f) while conceding that the tender document did not provide the space where the bidder had to insert the electrician's details the appellant could have sought a clarification or else submitted the details as an 'annex' as other bidders did, (g) admitted that clauses 1.2.11 and 2.1.3 were conflicting in the sense that the former stated that non-submission would have led to disqualification and the latter provided that the evaluation board could request a rectification thereon and (h) although in his version of the list of past contracts provided by the appellant these contained most of the information requested in the tender document form, yet the fact remained that the information requested in two columns was missing and the bidder could not alter the tender document;

- having also noted the recommended tenderer's representative's claims and observations, particularly, the references made to the fact that (a) contrary to what was claimed by the appellant, he could not omit the submission of the technical literature by assuming that he had already submitted sufficient technical information because the technical literature was a mandatory requirement which had to be provided in the first instance, (b) the fact that the contracting authority quoted sub-clause 8.7.17 (b) instead of (a) in clause 1.2.11 - should have been quite discernible - and the non-provision of space where to put down the details of the electrician were not good enough to justify the non-submission of the details because clause 1.2.11 was quite clear in its requirement,

reached the following conclusions, namely:

1. The Public Contracts Review Board feels that that the use of the term 'any' in clause 1.2.12 was not appropriate but, then again, it should have occurred to the appellant that this information had to be provided since non-compliance led to disqualification and, as a result, the appellant should have acted logically by asking the contracting authority for a clarification.
2. This Board observes that, in the absence of no space having been provided for the electrician's details, the appellant had the opportunity to ask the contracting authority to clarify the issue or else the appellant could have provided it as an 'annex' to his tender submission. Furthermore, this Board feels that, although there was an evident shortcoming on the part of the contracting authority, the bidder could not omit mandatory requirements as those requested at clause 1.2.11.
3. The Public Contracts Review Board considers as unacceptable the fact that, upon comparing the form submitted by the appellant with that provided in the tender

document it transpired that, basically, two columns were missing in the version submitted by the appellant, namely 'the location including address where works were carried out' and the 'name and contact number of A&CE in charge'.

4. This Board acknowledges the fact that, albeit the appellant's offer was the cheaper offer when compared to that of the recommended tenderer, still a bid could only qualify for financial consideration only if found to be technically compliant.

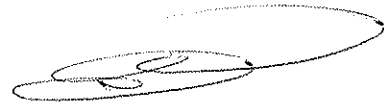
In view of the above, this Board finds against the appellant and recommends that the deposit paid by the same appellant for the appeal to be lodged should not be reimbursed.



Alfred R Triganza
Chairman



Joseph Croker
Member



Paul Mifsud
Member

10th September 2012