

PUBLIC CONTRACTS REVIEW BOARD

Case No. 463

CT/5036/2012

**Tender for Works related to Road Safety Upgrading at various Arterial Roads:
Traffic Signs**

This call for tenders was published in the Government Gazette on the 30th September 2011. The closing date for this call with an estimated budget of € 120,000 was the 25th October 2011. Three (3) tenderers submitted their offers.

Road Maintenance Services Ltd filed an objection on the 31st July 2012 against the decision of the Contracts Department to disqualify its offer as technically non-compliant with the provisions of Volume 3, Part 1, Clauses 1.2.2 and 1.4.3.

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 Tuesday, 2nd October 2012 to discuss this objection.

Present for the hearing were:

Road Maintenance Services Ltd

Dr John Bonello	Legal Representative
Mr Joseph Desira	Director

Koptasin

Mr Victor Bugeja L.P.	Legal Representative
Mr Louis Zammit	Representative

Transport Malta

Dr Joseph Camilleri	Legal Representative
Mr Joe Briffa	Representative
Mr Maurizio Micallef	Representative
Mr Adrian Sciberras	Representative

Evaluation Board

Perit Audrey Testaferrata De Noto	Chairperson
Perit Edric Micallef	Member
Perit Jessica Sammut	Member
Ms Elizabeth Markham	Member
Mr Thomas Debono	Secretary



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

Dr John Bonello, legal representative of Road Maintenance Services Ltd, the appellant company, submitted that, by letter dated 24th July 2012, the Contracts Department informed his client that his company's tender had been adjudicated to be technically non-compliant with the provisions of Volume 3, Part 1, Clauses 1.2.2 and 1.4.3 and that the tender was recommended for award to Koptasin for the price of €148,476.95.

A) Volume 3 Part 1 specification 1.2.2

Dr Bonello stated that:-

- i. Volume 3 Part 1 specification 1.2.2 referred to a number of technical standards with which the tenderer had to abide;
- ii. this clause had to be considered in the light of clause 1.2.1 which stated that "*Traffic signs shall comply with the Transport Malta (ADT) Specifications Series 1200 and the particular requirements as indicated in this document*";
and
- iii. in its tender submission, his client had presented a letter of conformity issued by the supplier which referred to Standard EN 12899 which was one of the two standards indicated in specification 1.2.2 and, as a consequence, one questioned how come that the offer was termed to be non-compliant in this respect.

Architect Audrey Testaferrata De Noto, chairperson of the evaluation board, explained that, regarding clause 1.2.2 one had to refer also to Volume 3 'Technical Specifications' (page 45) which, among other things, stated that:

'The Transport Malta Technical specifications for Roadworks are as per L.N. 29 of 2010, which can be accessed at (link given). The above specifications will however be overruled by the below Technical Specifications (Volume 3. Part 1), when conflicts between the two documents arise'

B) Specification 1.4.3 re. Sign Film Material

Dr Bonello submitted that:

- a. specification 1.4.3 provided as follows "*Retroreflection – the proprietary sheet facing material shall comply with the minimum coefficient of retroreflection in DIN 67520-4, Table 3, Class RA3*";
- b. in lay terms, this referred to the coating applied to signs so that these become visible to motorists during dark hours;

- c. pages 84 and 85 of his client's tender submission or pages 59 and 60 of the tender document featured the bill of quantities where the bidder was asked to quote prices of Category 2, namely Class RA2, and that turned out to be inconsistent with specification 1.4.3 which indicated Class RA3;
- d. for evaluation purposes, bidders had to be adjudicated on a like-with-like basis, namely all bidders had to quote for the same type of product otherwise there was bound to be a variation in the prices;
- e. in the bill of quantities his client quoted the prices relative to Category 2 or RA2 items as requested in the tender document, which prices were quite cheaper than those of Class RA3 items;
- f. Category 2 was mentioned three times in the bill of quantities, namely in sections 1 to 3 and, once it was conceded that there was an inconsistency between the technical specifications and the bill of quantities, then it was quite natural that different bidders would interpret the specifications differently.

Dr Joseph Camilleri, legal representative of Transport Malta, made the following submissions:-

- i. the appellant company was correct to state that there was an inconsistency in the published tender document between the technical specification 1.4.3, where Class RA3 items were requested, and the bill of quantities, where, through an oversight, Category 2 was indicated;
- ii. having said that, one could not adjudicate the appellant company's offer compliant because Category 2 or RA2 items were technically quite different in terms of quality from Class RA3 items;
- iii. given this discrepancy between the technical specifications and the bill of quantities, it was the norm that the technical specifications would take precedence over the bill of quantities;
- iv. once confronted with this inconsistency, the appellant company could have asked for a clarification but the said company apparently opted not to do so;
and
- v. the other tenderers abided by the technical specifications and offered Class RA3.

Architect Testaferrata De Noto, explained that:-

- a. the technical specifications represented the product requested by the contracting authority whereas the bill of quantities was meant to identify the quantities required and the relative price/s;
- b. if the bill of quantities were themselves the technical specifications then there would be no scope for one to include a section in the tender document exclusively for technical specifications (Volume 3);



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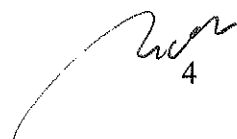
- c. although, admittedly, Category 2 was erroneously quoted in the bill of quantities, the operators in this line of work were aware that Category 2 was inexistent as a standard;
- d. it was an erroneous assumption on the part of the appellant company that the bill of quantities actually included RA2 because Category 2 did not refer to Class RA2;
- e. the appellant company had all the opportunity to ask for a clarification from the contracting authority but no such clarification was made;
- f. the appellant company opted to offer Class RA2 whereas the contracting authority requested Class RA3 which was superior in quality;
- g. in the course of evaluation the board had also noted that the technical literature had not been submitted with the offer and in terms of clause 16.1(c) (iv) and relevant note 2 (or in this case b), the contracting authority asked the appellant company to submit this missing document and from the technical literature eventually submitted it was confirmed that the appellant company was offering Class RA2;
- h. clause 16.1 (d) 'Evaluation Criteria/Technical Specifications' fell under note 3 (or c in this case) and, therefore, the contracting authority was prohibited from requesting the bidding company to rectify its bid by substituting Class RA2 with Class RA3;
- i. no matter how careful one was in drawing up of the tender document there was always the chance of an inconsistency cropping up and that was the reason why the tender document provided the opportunity to ask for clarifications both to the bidder, prior to submitting its tender, and to the evaluation board as per notes to clause 16.1 which were reproduced in all public tenders;

and

- j. albeit the other two tenderers had offered Class RA3 as per technical literature submitted whereas, in the case of the appellant company, it was not clear what it offered in the absence of relevant technical literature, yet when the appellant company did submit the technical literature it transpired that it referred to Class RA2.

Dr Camilleri declared that the bottom line was that the appellant company offered a product not according to the tender technical specifications and that was unacceptable. He added that no one was contesting that the appellant company's offer was cheaper but, then again, the main reason for that was that the product offered was different and inferior to that requested.

The Chairman Public Contracts Review Board reminded those present that it was the responsibility of the bidder to submit a clear and complete tender but it was also the



responsibility of the contracting authority to issue a complete and correct tender document.

Dr Bonello concluded that the contracting authority had conceded that there was an inconsistency between the technical specifications and the bill of quantities and it was not fair that the bidder, in this case his client, would have to suffer as a consequence of this shortcoming on the part of the contracting authority. He added that, with regard to clause 1.2.2, his client had submitted a certificate of conformity referring to EN 12899 which was listed in five of the six items quoted under that same clause.

Mr Victor Bugeja, on behalf of Koptasin, the recommended bidder, remarked that:-

- a. clause 1.4.3 was a mandatory requirement so much so that it stated that "*the propriety sheet facing material shall comply with the minimumClass RA3*";
- b. the bill of quantities only served the purpose of identifying the quantities required and the relative prices but it did not replace or overruled the technical specifications;


and

- c. it was not correct for the appellant company to claim at appeal stage that it was misled because, prior to the closing date of the tender, the company's representatives could have sorted out difficulties encountered in the interpretation of the tender provisions even though the other two participating bidders encountered no such difficulties.

At this point the hearing came to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated the 30th July 2012 and also through their verbal submissions presented during the hearing held on the 2nd October 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 24th July 2012, the Contracts Department informed the appellant company that its tender had been adjudicated to be technically non-compliant with the provisions of Volume 3, Part 1, Clauses 1.2.2 and 1.4.3 and that the tender was recommended for award to Koptasin for the price of €148,476.95, (b) Volume 3 Part 1 specification 1.2.2 referred to a number of technical standards with which the tenderer had to abide, (c) this clause had to be considered in the light of clause 1.2.1 which stated that "*Traffic signs shall comply with the Transport Malta (ADT) Specifications Series 1200 and the particular requirements as indicated in this document*", (d) in its tender submission the appellant company had presented a letter of conformity issued by the supplier which referred to Standard EN 12899 which was one of the two standards indicated in specification 1.2.2 and, as a consequence, one questioned how come that the offer was termed to be non-



compliant in this respect, (e) specification 1.4.3 provided as follows
“*Retroreflection – the proprietary sheet facing material shall comply with the minimum coefficient of retroreflection in DIN 67520-4, Table 3, Class RA3*” - in lay terms, this referred to the coating applied to signs so that these become visible to motorists during dark hours, (f) pages 84 and 85 of the appellant company’s tender submission or pages 59 and 60 of the tender document featured the bill of quantities where the bidder was asked to quote prices of Category 2, namely Class RA2, and that turned out to be inconsistent with specification 1.4.3 which indicated Class RA3, (g) for evaluation purposes, bidders had to be adjudicated on a like-with-like basis, namely all bidders had to quote for the same type of product otherwise there was bound to be a variation in the prices, (h) in the bill of quantities the appellant company quoted the prices relative to Category 2 or RA2 items as requested in the tender document, which prices were quite cheaper than those of Class RA3 items and (i) Category 2 was mentioned three times in the bill of quantities, namely in sections 1 to 3 and, once it was conceded that there was an inconsistency between the technical specifications and the bill of quantities, then it was quite natural that different bidders would interpret the specifications differently, (j) the contracting authority had conceded that there was an inconsistency between the technical specifications and the bill of quantities and it was not fair that the bidder, in this case the contracting authority, would have to suffer as a consequence of this shortcoming on the part of the contracting authority and (k) with regard to clause 1.2.2, the appellant company had submitted a certificate of conformity referring to EN 12899 which was listed in five of the six items quoted under that same clause;

- having considered the contracting authority’s representative’s reference to the fact that (a) regarding clause 1.2.2 one had to refer also to Volume 3 ‘Technical Specifications’ (page 45) which, among other things, stated that *‘The Transport Malta Technical specifications for Roadworks are as per L.N. 29 of 2010, which can be accessed at (link given). The above specifications will however be overruled by the below Technical Specifications (Volume 3. Part 1), when conflicts between the two documents arise’*, (b) the appellant company was correct to state that there was an inconsistency in the published tender document between the technical specification 1.4.3, where Class RA3 items were requested, and the bill of quantities, where, through an oversight, Category 2 was indicated, (c) having said that, one could not adjudicate the appellant company’s offer compliant because Category 2 or RA2 items were, technically, quite different in terms of quality from Class RA3 items, (d) given this discrepancy between the technical specifications and the bill of quantities, it was the norm that the technical specifications would take precedence over the bill of quantities, (e) once confronted with this inconsistency, the appellant company could have asked for a clarification but the said company apparently opted not to do so, (f) the other tenderers abided by the technical specifications and offered Class RA3, (g) the technical specifications represented the product requested by the contracting authority whereas the bill of quantities was meant to identify the quantities required and the relative price/s, (h) if the bill of quantities were themselves the technical specifications then there would be no scope for one to include a section in the tender document exclusively for technical specifications (Volume 3), (i) although, admittedly, Category 2 was erroneously quoted in the bill of quantities, the operators in this line of work were aware that Category 2 was inexistent as a standard, (j) it was an erroneous assumption on the part of the appellant company



that the bill of quantities actually included RA2 because Category 2 did not refer to Class RA2, (k) the appellant company had all the opportunity to ask for a clarification from the contracting authority but no such clarification was made, (l) the appellant company opted to offer Class RA2 whereas the contracting authority requested Class RA3 which was superior in quality, (m) in the course of evaluation the board had also noted that the technical literature had not been submitted with the offer and, in terms of clause 16.1(c) (iv) and relevant note 2 (or in this case b), the contracting authority asked the appellant company to submit this missing document and, from the technical literature eventually submitted, it was confirmed that the appellant company was offering Class RA2, (n) clause 16.1 (d) 'Evaluation Criteria/Technical Specifications' fell under note 3 (or 'c' in this case) and, therefore, the contracting authority was prohibited from requesting the bidding company to rectify its bid by substituting Class RA2 with Class RA3, (o) no matter how careful one was in drawing up of the tender document there was always the chance of an inconsistency cropping up and that was the reason why the tender document provided the opportunity for one to ask for clarifications both to the bidder, prior to submitting its tender, and to the evaluation board as per notes to clause 16.1 which were reproduced in all public tenders, (p) albeit the other two tenderers had offered Class RA3 as per technical literature submitted whereas, in the case of the appellant company, it was not clear what it offered in the absence of relevant technical literature, yet when the appellant company did submit the technical literature it transpired that it referred to Class RA2 and (r) the bottom line was that the appellant company offered a product not according to the tender technical specifications and that was unacceptable;

- having considered the recommended tenderer's representative's reference to the fact that (a) clause 1.4.3 was a mandatory requirement so much so that it stated that "*the propriety sheet facing material shall comply with the minimumClass RA3*", (b) the bill of quantities only served the purpose of identifying the quantities required and the relative prices but it did not replace or overruled the technical specifications and (c) it was not correct for the appellant company to claim at appeal stage that it was misled because, prior to the closing date of the tender, the company's representatives could have sorted out difficulties encountered in the interpretation of the tender provisions even though the other two participating bidders encountered no such difficulties,

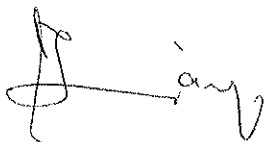
reached the following conclusions, namely:

1. The Public Contracts Review Board recognizes the fact that the appellant company was correct to state that there was an inconsistency in the published tender document between the technical specification, 1.4.3, where Class RA3 items were requested, and the bill of quantities, where, through an oversight, Category 2 was indicated.
2. Nevertheless, regardless of the highlighted inconsistency in the tender document, the Public Contracts Review Board argues that the appellant company had enough opportunity to seek clarification once an anomaly in the tender document was identified.
3. This Board also took cognizance of the fact that, contrary to the appellant company, the other tenderers had no problem with fully understanding what was



required. One cannot but conclude that, whoever is technically knowledgeable, including the appellant company's representatives, should have had no problem understanding what was being requested.

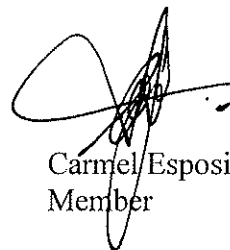
In view of the above, this Board finds against the appellant company but recommends that, in view of the admitted inconsistency in the specifications listed in the tender document, which this Board still maintains could have easily been clarified by the appellant company, the deposit paid by the same appellant for the appeal to be lodged should be reimbursed.



Alfred R Triganza
Chairman



Joseph Croker
Member



Carmel Esposito
Member

26 October 2012