

PUBLIC CONTRACTS REVIEW BOARD

Case No. 469

WSC/422/2012

Tender for the Supply and Delivery of Office Furniture

This call for tenders was published in the Government Gazette on the 25th May 2012. The closing date for this call with an estimated budget of € 50,011 (excl. VAT) was the 8th June 2012.

Twelve (12) tenderers submitted their offers.

C. Fino & Sons Ltd filed an objection on the 8th August 2012 against the decision of Water Services Corporation to disqualify its offer as technically non-compliant and to recommend the tender award to S.A.W. 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 Tuesday, 16th October 2012 to discuss this objection.

Present for the hearing were:

C. Fino & Sons Ltd

Dr John Gauci	Legal Representative
Dr David Zahra	Legal Representative
Mr Dino Fino	Representative
Mr Elton Borg	Representative

S.A.W. Ltd

Mr Stephen Azzopardi	Representative
----------------------	----------------

Water Services Corporation

Mr Mark Perez	Representative
---------------	----------------

Evaluation Board

Ing. Robert Schembri	Chairman
Perit Mario Balzan	Member
Mr Neil Buhagiar	Member
Ms Natasha Mallia	Member
Mr Anthony Camilleri	Secretary



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

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

- i. by letter dated 1st August 2012 the Water Services Corporation informed his client that the company's offer was not successful because the thickness of the desktop was not as per specifications at clause 3.1;
- ii. the bill of quantities included 166 items and the objection to his client's offer concerned only 4 executive desks, namely items 6 and 7 of the bill of quantities;
- iii. as requested, his client provided the technical literature with the company's tender submission;
- iv. with regard to the items in question, namely the executive desks, albeit his client submitted the standard literature supplied by the manufacturer which, admittedly, did not correspond exactly with the tender specifications, yet, by signing the 'tender form', his client had made the following undertaking as per para. 2 of the tenderer's declaration, namely

"WE offer to execute, in accordance with the terms of the tender document and the conditions and time limits laid down, without reserve or restriction, the following supplies"

- v. if one were to refer to the bill of quantities provided by his client one would note that it satisfied the tender specifications;
- vi. it was conceded that for items 6 and 7 his client provided the standard catalogue but that did not mean that the dimensions could not be modified according to the specifications of this particular tender;
- vii. clause 2.6 'Documentation' provided as follows:

'Prospective suppliers shall include, together with tender documents, sufficient literature, in the English language, to enable specifications' verification. The required literature shall be complete and shall preferably be related only to the equipment to be supplied. General manufacturer's literature should if possible be avoided, or should be clearly marked or outlined with respect to the actual unit/s being offered'

As a result, the use of the terms 'shall preferably' and 'should if possible' were clear indications that certain requirements were not all that mandatory;

- viii. his client provided the appropriate literature in respect of the other 162 items but in respect of 4 items, in the absence of the specific literature, his client



provided the general literature and, at the same time, bound the tendering company to provide what was requested in the tender document;

- ix. the General Contracts Committee, which previously attended to objections of this nature, had decided in Case No. 13 (UM/1432 – supply of office furniture to the University of Malta) as follows:

“After deliberating on the submission and from the evidence given the Committee feels that it is very difficult for any bidder to submit a catalogue with exactly the same specifications as detailed in the tender document. On the other hand the Committee notes that (the appellant company in that case was FXB) has signed a declaration by which the company committed itself to supply the furniture with the tender specifications. Consequently the Committee agreed that the University of Malta was not correct in their recommendation to award the above-mentioned contract to (the recommended bidder in that case was C.Fino & Sons Ltd);”

- x. that case was very similar to the one under review and, after taking into account that the issue concerned 4 out of 166 items, that it was permissible to submit generic literature and that there was the comfort of the ‘Tenderer’s Declaration’, then one could safely say that his client’s offer was compliant besides being about €15,000 cheaper.

Ing. Robert Schembri, chairman of the evaluation board, explained that:-

- a. if the appellant company had altered even by hand the specifications he provided so that they would read the same as those laid down in the tender document there would not have been the need to resort to this objection;
- b. as per clause 11 (d) and note 3 of the ‘Tender Form’, the evaluation board could not seek a rectification on the information already provided by the bidder and there was no need for a clarification because the specifications provided by the appellant company were clear enough, namely the catalogue indicated 25mm thickness;

and

- c. contrary to the interpretation given by the appellant company, his interpretation of clause 2.6 was in the sense that the contracting authority did not want general literature because the emphasis was on the requirement that the literature *“shall preferably be related only to the equipment to be supplied.”*

The Chairman Public Contracts Review Board held the view that the term ‘shall preferably’ was not mandatory but very desirable because otherwise the contracting authority would have used the term ‘must’ or ‘shall’.

Dr Gauci reiterated that his client had signed the ‘Tenderer’s Declaration’ to supply the goods as specified in the tender document and the bill of quantities made reference

to the tender specifications at clause 3.1 in respect of the items concerned, no. 6 and 7, and, as a consequence, his client was, effectively, offering the items requested and not those described in the general catalogue.

The Chairman Public Contracts Review Board remarked that:-

- i. what would, eventually, be contractually binding were the bidder's declaration and the bill of quantities, whereas the technical literature was meant to corroborate by way of supporting documents;

and
- ii. on one hand, one appreciated that the evaluation board was not in a position to contact the bidder to substitute the technical literature already submitted but, on the other hand, the evaluation board could have asked the bidder to clarify the anomaly/discrepancy between the technical literature submitted and the tenderer's declaration made together with the bill of quantities submitted – that would not have changed anything but it would have provided the bidder the chance to offer an explanation and then it would have been up to the evaluation board to decide whether it was satisfactory or not.

The Public Contracts Review Board agreed with the view expressed by Ing. Schembri that the appellant company could have or should have inserted a note by hand in the catalogue that the thickness should read that requested in the tender specifications.

Ing Schembri argued that the declarations made by the bidder carried their weight but limitedly because, otherwise, the tendering process would be reduced to simply signing those general declarations without the need to submit all the usual documentation. He added that if the contracting authority were to be very rigid in its technical requirements then bidders would complain that such specifications were exclusive and limited competition.


Ing. Mark Perez, also representing the Water Services Corporation, remarked that the catalogue provided by the appellant company did not enable the evaluation board to carry out the specifications' verification mentioned in clause 2.1.

The Chairman Public Contracts Review Board reiterated that, notwithstanding the valid arguments put forward by the contracting authority, one could not ignore the 'tenderer's declaration' and the 'bill of quantities'.

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 7st August 2012 and also through their verbal submissions presented during the hearing held on the 16th October 2012, had objected to the decision taken by the pertinent authorities;



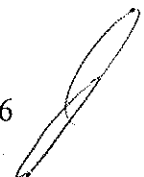
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 1st August 2012 the Water Services Corporation informed the appellant company that its offer was not successful because the thickness of the desktop was not as per specifications at clause 3.1, (b) the bill of quantities included 166 items and the objection to the appellant company's offer concerned only 4 executive desks, namely items 6 and 7 of the bill of quantities, (c) as requested, the appellant company provided the technical literature with its tender submission, (d) with regard to the items in question, namely the executive desks, albeit the appellant company submitted the standard literature supplied by the manufacturer which, admittedly, did not correspond exactly with the tender specifications, yet, by signing the 'tender form', the appellant company had made the following undertaking as per para. 2 of the tenderer's declaration, namely "*WE offer to execute, in accordance with the terms of the tender document and the conditions and time limits laid down, without reserve or restriction, the following supplies*", (e) if one were to refer to the bill of quantities provided by the appellant company one would note that it satisfied the tender specifications, (f) it was conceded that for items 6 and 7 the appellant company provided the standard catalogue but that did not mean that the dimensions could not be modified according to the specifications of this particular tender, (g) clause 2.6 'Documentation' provided as follows *'Prospective suppliers shall include, together with tender documents, sufficient literature, in the English language, to enable specifications' verification. The required literature shall be complete and shall preferably be related only to the equipment to be supplied. General manufacturer's literature should if possible be avoided, or should be clearly marked or outlined with respect to the actual unit/s being offered'*, (h) as a result, the use of the terms 'shall preferably' and 'should if possible' were clear indications that certain requirements were not all that mandatory, (i) the appellant company provided the appropriate literature in respect of the other 162 items but in respect of 4 items, in the absence of the specific literature, it provided the general literature and, at the same time, bound the tendering company to provide what was requested in the tender document, (j) the General Contracts Committee, which previously attended to objections of this nature, had decided in Case No. 13 (UM/1432 – supply of office furniture to the University of Malta) as follows "*After deliberating on the submission and from the evidence given the Committee feels that it is very difficult for any bidder to submit a catalogue with exactly the same specifications as detailed in the tender document. On the other hand the Committee notes that (the appellant company in that case was FXB) has signed a declaration by which the company committed itself to supply the furniture with the tender specifications. Consequently the Committee agreed that the University of Malta was not correct in their recommendation to award the above-mentioned contract to (the recommended bidder in that case was C. Fino & Sons Ltd)*", (k) apart from the fact that case (Case No. 13 (UM/1432) was very similar to the one under review and, after taking into account that the issue concerned 4 out of 166 items, that it was permissible to submit generic literature and that there was the comfort of the 'Tenderer's Declaration', then one could safely say that the appellant company's offer was compliant besides being about €15,000 cheaper and (l) the appellant company had signed the 'Tenderer's Declaration' to supply the goods as specified in the tender document and the bill of quantities made reference to the tender specifications at clause 3.1 in respect of the items concerned, no. 6 and 7, and, as a

consequence, the said company was, effectively, offering the items requested and not those described in the general catalogue;

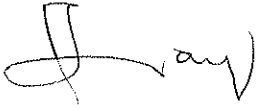
- having considered the contracting authority's representative's reference to the fact that (a) if the appellant company had altered even by hand the specifications it provided so that they would read the same as those laid down in the tender document there would not have been the need to resort to this objection, (b) as per clause 11 (d) and note 3 of the 'Tender Form', the evaluation board could not seek a rectification on the information already provided by the bidder and there was no need for a clarification because the specifications provided by the appellant company were clear enough, namely the catalogue indicated 25mm thickness, (c) contrary to the interpretation given by the appellant company, the evaluation committee's interpretation of clause 2.6 was in the sense that the contracting authority did not want general literature because the emphasis was on the requirement that the literature "*shall preferably be related only to the equipment to be supplied.*", (d) the declarations made by the bidder carried their weight but limitedly because, otherwise, the tendering process would be reduced to simply signing those general declarations without the need for one to submit all the usual documentation, (e) if the contracting authority were to be very rigid in its technical requirements then bidders would complain that such specifications were exclusive and limited competition and (f) the catalogue provided by the appellant company did not enable the evaluation board to carry out the specifications' verification mentioned in clause 2.1,

reached the following conclusions, namely:

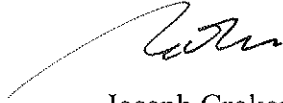
1. The Public Contracts Review Board holds the view that the term 'shall preferably' was not mandatory but it implied that it was 'desirable' because otherwise the contracting authority would have used the term 'must' or 'shall'.
2. The Public Contracts Review Board establishes that what would, eventually, be contractually binding are the bidder's declaration and the bill of quantities, whereas the technical literature should, unless otherwise particularly specified, be regarded as supporting documentation aimed at corroborating other material submitted in the same offer.
3. This Board feels that whilst, on one hand, one appreciated that the evaluation board was not in a position to contact the bidder to substitute the technical literature already submitted but, on the other hand, the evaluation board could have asked the bidder to clarify the anomaly/discrepancy between the technical literature submitted and the tenderer's declaration made together with the bill of quantities submitted – that would not have changed anything but it would have provided the bidder the chance to offer an explanation and then it would have been up to the evaluation board to decide whether it was satisfactory or not.
4. The Public Contracts Review Board argues that, notwithstanding the valid arguments put forward by the contracting authority, one could not ignore the 'tenderer's declaration' and the 'bill of quantities'.



In view of the above, this Board finds in favour of the appellant company and recommends that the deposit paid by the same appellant for the appeal to be lodged should be reimbursed.



Alfred R Triganza
Chairman



Joseph Croker
Member



Paul Mifsud
Member

29 October 2012