PUBLIC CONTRACTS REVIEW BOARD

Case No. 640

TWO 5/2013

Tender for Catch-Up Repairs, Replacement of Dangerous Structures, Alterations and Maintenance Works at Block 5B, Triq is-Sur, L-Isla in an Environmentally Friendly Manner.

The tender was published on the 10th September 2013. The closing date was the 27th September 2013.

The estimated value of the Tender was €98,925.58 (Exclusive of VAT).

Three (3) bidders had submitted an offer.

On the 27th November 2013, Mr Joseph Caruana filed an objection against the decision taken to disqualify his offer on grounds of being technically non-compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Wednesday 4th December 2013 to discuss the appeal.

Present for the hearing were:

Mr Joseph Caruana - Appellant

Mr Joseph Caruana	Representative
Mr George Farrugia	Representative
Dr John Gauci	Legal representative

B. Grima & Sons Limited - Preferred Bidder

Mr Adam Grima	Director
Mr Arthur Calleja	Representative
Dr Tonio Cachia	Legal Representative

Housing Authority - Contracting Authority

Perit Felix Sciberras	Chairman Evaluation Board
Mr Emile Lauria	Member Evaluation Board
Mr Charles Vella	Member Evaluation Board
Mr Aldo Ellul	Member Evaluation Board
Perit Melanie Spiteri	Representative
Perit Alessandro Fiott	Representative
Mr Stephen Mc Carthy	Chief Executive Officer
Dr Abigail Caruana	Legal Representative

The Chairman made a brief introduction wherein he stated that this and objection from tender TWO 4/2013 would be heard together since the parties involved are the same in both tenders, and the merits of the objection are the same.
The appellant's representative was invited to make his submissions on the objection.

Dr John Gauci on behalf of the appellant Mr Joseph Caruana said that the two tenders were identical except in one of them, TWO 5/2013 there had been three bidders. His client the appellant had submitted the cheapest tender. The award criterion in both tenders was the price. Yet appellant had been disqualified because the "Literature for concrete repair products – product provided in literature are not adequate for use as concrete repair as requested in the tender." Appellant had produced all the requested literature for concrete repair and it can be confirmed that the products he intended using can be used for any work and is in fact the most used. The literature containing all the details was submitted. The tender provided no specifications regarding what the submitted product had to comply with. Since no specifications were given then the contracting authority cannot disqualify his client's bid. The contracting authority cannot ask for something that was not requested in the tender. Dr Gauci referred to several other cases on this point that had been decided by the Public Contract Review Board and the Civil Courts. These state that a contracting authority cannot at the evaluation stage make choices not stated in the original tender and disqualifying bidders on those choices.

Dr Abigail Caruana on behalf of the contracting authority said that the appellant's offer was disqualified at the technical evaluation stage. The reason for the rejection of the appellant's bid was that the concrete repair products provided by appellant, according to the literature submitted were not adequate for concrete repairs as requested. According to Form 6 bidders had to submit with their offers a list of literature. And point 1.4 refers to the concrete repair products Section H. This section H found at page 82 of the tender explained in detail what was to be provided when repairing concrete. Spalled concrete ceilings required: 1. Coating for the mesh; 2. A bonding coat for concrete surfaces; 3. Freshly mixed repair mortar and 4. A coat of protective finish. Items 2 and 3 could be the same product. The contracting authority required a list of these products to ensure that the products are adequate for the repair of the ceilings. Appellant's bid listed two products only, the mortar mix and the protective coating. The product submitted by appellant is used for protective finishing, item 4, but he did not submit any metal mesh coating. The mixed repair mortar submitted by appellant cannot be used to repair concrete. The contracting authority wanted to ensure that proper repairs of the spalling concrete were carried out to ensure that it does not spall again in a short time. No rectification was possible on this point.

Perit Melanie Spiteri on behalf of the contracting authority under oath said that the literature for the mortar mix submitted by appellant states " a quality mixture of sand and cement for laying brick, block or stone; for building or repairing chimneys, walls, planters and out-door grills. The work required to be done in this tender involves repairing spalled concrete ceilings where the mesh had rusted. There were many products on the market to enable the repair of concrete ceilings. Thus contractor would have to remove the spalled part of the concrete, clean the metal mesh, coat the mesh with inhibitors and then apply the mortar mix and the finishing and protective coat. The main product is the mortar mix. The mortar mix offered by the appellant is suitable for repairing bricks, and is not used in Malta. As corrosion inhibitor, the appellant offered Sicaguard. This product while good enough for the finishing stage, does not provide corrosion inhibitors for the mesh. Sica also produces such corrosion inhibitors but the appellant did not submit them. The products offered by appellant are not

suitable for the repair of spalled concrete ceilings.

Replying to questions by Dr John Gauci Ms Spiteri stated that the product specifications are shown clearly in Section H of the tender document. There were no other specifications. She declared that she did not see before the document being shown by Dr Gauci entitled "long term protection for steel". It was not part of the technical offer. Here the Board examined both the tender documents filed by the appellant and however there was no such document to be found. She confirmed that Form 6, item 1.4 requested the literature of the concrete products. Appellant nowhere in the tender bid stated that he would not comply with the methodology as per section H. Bidders had to submit all literature about all the products they would be using to repair the concrete ceilings. She re-affirmed that the mortar submitted by appellant was not suitable.

Dr Abigail Caruana stated that the term 'concrete repairs' is meant to include all the aspects of the methodology for such repairs and include all the products to be used.

The hearing was at this point brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 27th November 2013 and also through the Appellant's verbal submissions during the hearing held on 4th December 2013, had objected to the decision taken by the pertinent Authority, in that:

a) **The Appellant had submitted the cheapest tender and the principal award criteria was the price.**

b) **The Appellant's offer was discarded by the Evaluation Board due to the alleged fact, that the literature which the Appellant submitted regarding the product to be used in the tender works, did not meet the technical specifications as required in the tender document.**

c) **The Appellant contends that the tender document did not specify the technical specifications required for the process to be carried out in the works of the tender.**

d) **The Appellant also contends that since the Contracting Authority did not specify the technical specifications in the tender document, in the first place, it could not dictate during the evaluation stage specifications which were not stipulated in the tender document.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 4th December 2013, in that:

a) **The Evaluation Board of the Contracting Authority discarded the Appellant's offer on technical grounds.**

b) The Appellant's product being offered is not suitable for the project being contemplated in this tender.

c) The Contracting Authority had to ensure that the preferred tenderer would carry out the required tender works with the requisite technical products so that the works, when completed, would last for a long period of time.

d) The details as specified in section H in the tender document, did in fact stated the technical requirements and procedures to be adhered to by the Appellant.

Reached the following conclusions:

1. **This Board opines that the Contracting Authority could have specified in more details the requirements regarding the technical specifications that should have been laid out in the tender document. However, after having heard the technical experts regarding the quality of the Appellant's products to be utilised in the execution of the tender works, it was evidently clear, that the Appellant's construction products, were not up to the technical standards as laid out in the tender requirements.**

2. **The Contracting Authority was in duty bound to ensure that the works specified in the tender document had to be executed with the proper methodology and technical construction products as dictated in the tender document. This Board feels that the Contracting Authority acted diligently in the evaluation process.**

3. **The Evaluation Board took all the necessary safeguards to ensure that the works and materials to be to be adopted by the tenderer had to cater for the natural elements where the works are to be carried out.**

In view of the above, this Board finds against the Appellant and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Lawrence Ancillieri
Chairman	Member	Member

6 December 2013