

PUBLIC CONTRACTS REVIEW BOARD

Case No. 727

CT 3078/2014

Tender for the Supply, Delivery, Installation, Testing, Commissioning and Certification of Grid-Connected Photovoltaic Systems at Various Buildings on University Campus Msida and at the Junior College.

The tender was published on the 17th June 2014. The closing date was the 29th July 2014. The estimated value of the Tender was €800,000 (Exclusive of VAT)

On the 28th July 2014 Electrofix Limited filed a pre-contractual concern under Regulation 85 of the Public Procurement Regulations claiming that the tender specifications are tailored to the strengths of a particular supplier.

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 the 20th August 2014 to discuss the objection.

Present for the hearing were:

Electrofix Limited - Appellant

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| Mr Joseph Schembri | Representative |
| Mrs Debbie Schembri | Representative |
| Mr Julian Borg | Representative |
| Dr Matthew Paris | Legal Representative |

University of Malta - Contracting Authority

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| Mr Edward Gatt | Representative |
| Mr Juan Grech | Representative |
| Mr Joseph Micallef | Representative |
| Mr Karm Saliba | Representative |
| Dr Oriella De Giovanni | Legal Representative |

Department of Contracts

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| Ms. Ninette Gatt | Procurement Manager |
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Others

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| Mr Joseph Calleja | Student |
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The Chairman made a brief introduction and invited appellant's representative to make his submissions.

Dr Matthew Paris on behalf of the appellant raised the matter of the contracting authority's letter of reply to the objection. This was signed in the name of the evaluation board. Apart from the fact that this letter was '*ultra vires*' since the evaluation board is not there to defend the position of the contracting authority, in doing so, the board has shown prejudice against appellant. Dr Paris insisted that the evaluation board had no say in the matter. The evaluation board only takes over the adjudication process immediately after the closing date of the tender. When the letter of objection was filed the tender was still open and the evaluation board had no place at that stage to intervene. As a result, the evaluation board has shown its bias against appellant. Dr Paris thus asked that the Public Contracts Review Board orders the removal of the contracting authority's letter of reply from the records of the case. Furthermore he requested that the evaluation board members be changed before starting the eventual evaluation since the present members have shown their bias against his client.

The Chairman remarked to the contracting authority that in cases of a pre-contractual concern no deposits are necessary, contrary to what was asserted in the contracting authority's letter of reply.

Dr Oriella De Giovanni on behalf of the contracting authority said that she could not agree with appellant because the evaluation board's secretary had just listed the facts. She contended that the contracting authority had every right to demand the specifications that satisfy the needs of the said authority. She insisted that this objection was vexatious and frivolous because the appellant company does not supply PV panels and is now alleging that the University of Malta wanted to favour a particular company. The Secretary of the evaluation board prepared a report, as he does in all tenders, explaining matters. She opposed the request for the removal of the letter from the records. She stated that after all, seven bidders had attended the onsite meeting.

Dr Matthew Paris insisted that the evaluation board should not have intervened at that stage; the function of the evaluation board starts at the closure of the tender bids. The contracting authority could have replied to the objection but not the evaluation board. The letter of reply clearly states that it was written in the name of the evaluation board and not on behalf of the contracting authority. He insisted that the evaluation board is now biased against his client, and he insisted that a new board be appointed.

The Chairman informed those present that the letter of reply would be removed from the records.

Dr Matthew Paris said that his client was aggrieved because it was felt that the specifications were tailor-made to favour one brand of the product. The specifications were a priori chosen to reflect those of a particular brand, Sunpower. The evaluation of the tender is not made according to those attending the onsite meetings but on the tenders submitted. However the grievance was not raised only by the appellant. This can be seen from the clarifications. One of these asked "*Is the authority aware that these particular specifications can only be provided by one brand and by no other. This eliminates all competitive proposals presented by the said brand. Can the authority confirm that it will accept bids with specifications which approximate those above without any risk of disqualification to the bidder.*" The reply given was to refer to Answer 10 in clarification letter number 2. Another clarification

question number 6 explained that the requisites as per clause 4.2 were very restrictive and can only be met by one manufacturer. This bidder even named Sunpower as the supplier in question. The reply again referred to Answer 10. Answer 10 referred to 40 years warranty instead of the standard 25 years. Appellant is therefore stating that the specifications were tailor-made to favour Sunpower. These are high end panels and not domestic panels and are supplied by only three suppliers. It is not true that these specific high end panels are the most efficient on the market because the efficiency depends on many variables. Cheaper panels could in fact prove to be more efficient because the variables could favour them. This was not a pilot project because 1800 panels are being used.

Ms Deborah Schembri, ID No 77073M, Director with Electrofix under oath stated that appellant has been operating in the energy sector for the past 10 years, supplying important installations. A few weeks ago appellant provided Medserv with the largest solar panel system in Malta. When appellant had gone through the tender specifications it became apparent that these would lead to a specific panel. The tender asked for high efficiency panels. The international sector for these panels is very limited, around five. The tender specifications just fell short from mentioning the panel by name – Sunpower. This fact also came out through the clarifications issued by the contracting authority. The market for these high efficiency panels is between four to five panel brands. The contracting authority could have widened the parameters allowing a more just tendering process. The specifications targeted a specific panel. This could be seen from the requested warranty period asked for, the efficiency requested, and the wattage of the requested panel. Only one panel would qualify. The requested panel specifications include 21% efficiency; the wattage of 3.5; the warranty only as offered by Sunpower; the life time of forty years. These are all reported in the Sunpower specifications. It is undeniable that Sunpower is one of the best brands for high efficiency panels but other panels should not be excluded. Efficiency is limited by certain parameters in the surrounding. It is not correct to base choice on the efficiency because it is the power output that is relevant. Efficiency changes according to variables. In Spain, tests were conducted and the results show that normal standard panels gave better efficiency than high end panels because the high temperature of the environment caused a lower efficiency for high end panels.

At this point Dr Paris objected to the production of Mr Joseph Micallef as witness since witness was present in the hall during the hearing. The Chairman explained that the Board wanted to ask witness some questions and would thus allow him to testify.

Professor Joseph Micallef ID No. 75452M for the contracting authority under oath, replying to questions by the Chairman stated that when the specifications were drafted these were based on the fact that the contracting authority was committed to reduce the carbon footprint. Since the roof area of the university was limited, the contracting authority wanted the best technology. The basis of testing PV panels is the standard test. This test is carried out on different panels but the parameters would be the same for each panel. What matters is the nominal rated value which is the watts peak. A panel that is rated at 20 watts peak can never be compared with another rated at 240 watts peak. If another company submitted 240 watt peak panels then it would be submitting equivalent panels. Replying to a question by Dr Charles Cassar, witness said that the contracting authority, having a limited roof area, wanted the best technology on the market. The same goes for the inverters used with the panels where practically all suppliers of PV panels in Malta offer the same inverter which is the best one. Sunpower is the best type of panel. Replying to questions by Dr Paris, witness confirmed that the specifications asked for panels having 240 watt peak minimum. Because

of the summer heat the output of panels diminishes so the specifications asked for higher efficiency. Only Sunpower provides the requested specifications. The contracting authority went for the best technology knowing that panels using this technology are available to any company in Malta. Several companies in Malta can offer Sunpower panels. Any company can quote you a price for the provision of Sunpower panels.

Dr Oriella De Giovanni said that appellant, after receiving the contracting authority's letter, has changed the terms of the objection because now it is being contended that the contracting authority has limited the choice of panel to one particular brand.

Dr Matthew Paris for the appellant said that Professor Micallef had confirmed that according to the contracting authority only one specific panel satisfied the tender specifications. This confirms that tailor making exists and Sunpower is being favoured. Was this justified? The law, the European Directive, states that this cannot be justified. Tailor made specifications can never be justified. The Public Contracts Review Board has affirmed this in the Aurelia case and The European Court of Justice says this in the case against Denmark. The United Nations Commission against Corruption also states that there should not be any tailor-made specifications to ensure that there is transparency and avoid the possibility of corruption.

The Chairman at this point ordered that the letter of reply filed by the evaluation board be removed from the records of the case.

At this point the hearing was closed.

This Board,

Having noted the Appellant's 'Pre Contractual Concern' via Letter of Objection dated 28th July 2014 and also through Appellant's verbal submissions during the hearing held on 20th August 2014, in that:

- a) **Appellant's main concern is that the technical specifications as dictated in the tender document were formulated on technical data of a particular brand; so that, these specifications not only limited a fair competition but also goes against the spirit of 'level playing field'.**
- b) **Appellant claims that other alternative technical options could also satisfy the requirements as stipulated in the tender document.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 20th August 2014, in that:

- a) **Since the Contracting Authority had limited roof space area, the type of technical specifications had to provide the required energy in the limited available space.**
- b) **The Contracting Authority confirmed that the requested technical specifications as dictated in the tender document accommodated only one bidder, namely 'Sunpower'.**

Reached the following conclusions:

- 1. This Board acknowledges the fact that the Contracting Authority, when formulating the technical specifications of the tender document, same took into consideration the available parameters of the area where the specific equipment had to be installed. But at the same time, this same Board cannot accept the fact that technical specifications in a tender document are formulated on technical data of a particular type of brand. From credible submissions made by the Contracting Authority's technical evaluation member, this Board established without any doubt that the technical specifications were in fact based on the technical data of a particular brand. In this regard, this Board upholds the Appellant claim that the technical specifications were tailor-made.**
- 2. This Board opines that although the Contracting Authority, in its best interests, thrive to obtain the best product, at the same time, by dictating technical specifications formulated on the data of a particular brand of a product; is limiting fair competition and giving advantage to a particular tenderer, which is an unacceptable principle.**

In view of the above, this Board recommends that the technical specifications should be more generic and unrestrictive so as to allow more space for healthy competition, fairness and transparency. This Board recommends that the tender be re-issued to include technical specifications following these basic but fundamental principles.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

25 September 2014