

PUBLIC CONTRACTS REVIEW BOARD

Case No. 960 – FTS 55/16: Tender for the Construction of Lift Shaft and Minor Internal Alterations Using Environmental Friendly Products at Haz Zebbug Child Care Centre.

The Tender was published on the 29th April 2016. The closing date was on the 20th May 2016. The estimated value of the Tender is €37,036.14 (Exclusive of VAT).

Three (3) bidders had made offers for this Tender.

On the 11th July 2016 I Projects Limited filed an Objection against the decision of the Contracting Authority that found its Tender technically non-compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a hearing on Tuesday the 2nd August 2016 to discuss the Objection.

Present for the hearing were:

I Projects Limited:

Mr Mario Grixti	Representative
Mr Nicholas Mallia	Representative
Dr Stefan Zrinzo Azzopardi	Legal Representative

Delta Projects:

Mr Aron Vella	Representative
---------------	----------------

Foundation For Tomorrow's Schools:

Mr Joseph Zerafa Boffa	Chairperson Evaluation Board
Mr Ivan Zammit	Secretary Evaluation Board
Mr Joseph Saetta	Member Evaluation Board

The Chairman made a brief introduction and invited the Appellant's representative to make his submissions.

Dr Stefan Zrinzo Azzopardi on behalf of i Projects Ltd pointed out that the e-mail sent to his client referring to this hearing said that the Recommended Bidder was Piscopo Gardens. It was explained that that was a mistake probably caused by the fact that the address of the Recommended Bidder – Delta Projects – was Piscopo Gardens. Dr Zrinzo Azzopardi said that he would start by hearing the testimony of Architect Nicholas Mallia.

Architect Nicholas Mallia, ID No. 308181M, called as witness by the Appellant, under oath explained that i Projects Ltd had offered with the Tender a product called CEMEX for rendering that was a Portland cement mix which is GR1000.

However after a request for clarification by the Contracting Authority, the Appellant had sent the literature of another identical product called Bayern S-Grey that was equivalent and interchangeable with the CEMEX product. Both products were GR1000 and while CEMEX had a US standard, the Bayern S-Grey had a European standard. He confirmed to the Chairman that both products were identical equivalent and had the same standard and quality level.

Mr Ivan Zammit on behalf of Foundation for Tomorrow's Schools said that the Evaluation Board had asked the Appellant to provide the technical data of the cement lime mix offered with the Tender; that was the technical offer made by the Appellant. According to the regulations, i Projects Ltd should have provided the technical information of the offered product CEMEX.

The rating GR1000 was never mentioned in the Tender. When the Appellant replied to the clarification it resulted that the offered product had been changed from CEMEX to Bayern S-Grey which were not the same product because even the Literature is different. This could not be done in terms of the Public Procurement Regulations since one of the basic principles of the latter is that a bidder cannot change a product once it has been offered as part of a Tender.

In this case, the Appellant had been asked to prove the equivalency of the product offered, CEMEX, but instead had offered another product, Bayern S-Grey. This was the reason why the Tender had been rejected. The Appellant wanted to change the product after the Tender was submitted.

Dr Stefan Zrinzo Azzopardi for the Appellant contended that as the witness had explained, albeit having two brand names, both products offered were compliant with the requisites and gave the same results. He pointed out that the item in question was after all a tiny fraction of the value of the whole Tender as per Bill of Quantities.

The product originally offered was US standard while the second one was EN standard. Although having two different brand names, the product was the same and not changed. He cited a recent decision by the Court of Appeal in the names John Micallef versus the Ministry for Interior Affairs that defined the difference between rectification in the submitted literature and clarification of the offered product which remained within the requisites.

If the original product was non-compliant this would mean that the technical submission was being changed. But in this case the original product was technically compliant and the

technical submission has not been changed.

Mr Ivan Zammit for the Contracting Authority explained that the Department of Contracts had been consulted and the result is clear that the Technical Offer falls under note 3 and therefore there can be no rectification while the Technical Literature falls under note 2 and so rectifiable. He reiterated that changing the offered product was not acceptable in a clarification.

At this point the hearing was closed.

This Board,

Having noted the Appellant’s Objection, in terms of the “*Reasoned Letter of Objection*” dated 11 July 2016 and also through their verbal submissions during the Public Hearing held on 2 August 2016 had objected to the decision taken by the Pertinent Authority, in that:

- a) I Projects Limited contend that his offer was unfairly rejected that upon a requested clarification from the Contracting Authority, they submitted another brand name product from the one submitted in the original documentation.**

In this regard, the Appellant maintains that since the Technical Specifications were identical to what was requested in the Tender Document, his offer should not have been rejected.

Having considered the Contracting Authority’s “*Letter of Reply*” dated 14

July 2016 and also their verbal submissions during the Public Hearing held on 2 August 2016 in that:

- a) Foundation for Tomorrow's Schools contend that the Appellant's offer was rejected simply due to the fact, that upon a requested clarification by the latter regarding the equivalency of the Appellant's product, the latter submitted an offer of another product, namely Bayern S-Grey.**

According to the Regulations, the Appellant should have provided the requested Technical Information of the originally offered product, which was "Cemex".

Reached the following conclusions:

- 1. This Board, after having examined the relevant documentation and the submissions made by both parties concerned, would like to respectfully refer to the decision taken by the Hon. Court of Appeal wherein it was quoted:**

"9. L-argument tal-Appellanti f' dawn iż-żewġ aggravji jidher illi hu illi kien hemm inkompatibilita' bejn l-ispeċifikazzjonijiet fil-"letteratura",

presumibilment ghax riedet toffri l-prodott “X” li ghandu l-ispeċifikazzjonijiet deskritti fl-offerta, u wriet ċar li qiegheda toffri prodott “Y” li ghandu speċifikazzjonijiet oħra. Ghalhekk, tghid l-Appellanti, kellha tingħata fakolta’ “to rectify any incorrect documentation”

10. *L-Appellanti kien ikollha argument li kieku tassew l-ispeċifikazzjonijiet tekniċi tal-offerta tagħha kienu kompatibbli ma’ dak li riedet is-sejha iżda twarrbet ghax ippreżentat dokumenti bi żball li juru speċifikazzjonijiet oħra. Iżda kif jidher mill-ittra tal-1 ta’ Frar 2016, (li biha d-Dipartiment gharraf lill-Appellanti li l-offerta tagħha giet imwarrba), l-offerta twarrbet ghax il-prodotti offerti nfushom ma kinux kif riedet is-sejha ghal offerti. Li kieku l-Appellanti thalliet tibdel il-“letteratura” kienet tkun qieghda effettivament tinqeda bid-dokumenti godda biex tibdel is-sustanza tal-offerta: fi kliem il-Bord ta’ Reviżjoni, “this would have lead to a “Rectification” [tal-offerta, mhux tad-dokumenti] which is not allowed.”*

- **This Board, after hearing the witness’ testimony made under oath, established, without reasonable doubt, that the other different product offered by the Appellant in response to the clarification, was technically compliant and met all the requirements dictated by the**

Tender Document, although by a different brand name.

It is being acknowledged that since the Appellant submitted a different brand name, the Evaluation Board had no other option but to apply Note 2 which does not allow a change in the Literature and Note 3 which specifies that there can be no rectification.

- **The Principle, positively decided by the Hon. Court of Appeal applied to the non-conformity of literature when compared to the Technical Specifications of the product in the original offer. The acceptance of such a submission would have amounted to a *“Rectification”*.**

In this regard, this Board credibly notes that the different Brand name of the product was submitted on the strength of a clarification.

In this case, through the Expert’s testimony, it was credibly established that the new product had the same Technical Specifications of the originally offered product as stated under oath by the Expert who confirmed that both Bayern S. Gray and Cemex were *“equivalent and interchangeable and both products were identically equivalent and had the same standard and quality level”*.

In this regard, it is being confirmed that both products offered by I Projects Limited were identical, in so far as the Technical Compliancy is concerned but they had a different brand name.

This Board opines that since both the Product in the original submission and the Product offered in the clarification, were both identical and both compliant, there was no instance which gave the Appellant an advantage over the other Technically Compliant Bidders.

This Board also opines that since the product Bayern S-Grey had the same standards of Cemex, the only change that existed was the Brand Name and although there was a change of form, substance persisted. In this regard, this Board upholds the Appellant's contentions.

In view of the above, this Board finds in favour of I Projects Limited and recommends that:

- i) The Appellant's Offer is to be re-integrated in the Evaluation Process.**

ii) The Deposit paid by the Appellant should be refunded.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

9 August 2016