

PUBLIC CONTRACTS REVIEW BOARD

Case 2004 – CT 2306/2023 – Supplies Tender for the Supply, Delivery, Installation, Testing and Commissioning of Standby Generator Set for Mount Carmel Hospital

10th May 2024

The tender was issued on the 6th October 2023 and the closing date was the 31st October 2023.

The estimated value of this tender, excluding VAT, was € 420,000.

On the 5th February 2024 Electro Fix Ltd filed an appeal against the Central Procurement and Supplies Unit objecting to its disqualification on the grounds that its bid was deemed to be technically not compliant.

A deposit of € 2,100 was paid.

There were six bids.

On the 2nd May 2024 the Public Contracts Review Board composed of Dr Charles Cassar as Chairman, Ms Stephanie Scicluna Laiviera and Mr Richard A Matrenza as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Electro Fix Ltd

Dr Karl Tanti	Legal Representative
Mr Joseph Schembri	Representative
Mr Arthur Magri	Representative

Contracting Authority – Department of Fisheries and Aquaculture

Dr Leon Camilleri	Legal Representative
Mr Stephen Mercieca	Chairperson of the Evaluation Committee
Mr Albert Incorvaja	Evaluator
Mr Franco Cassar	Evaluator
Mr Daniel Gauci	Representative

Preferred Bidder – Falzon Energy Projects

Dr Maurice Meli	Legal Representative
Ms Tara Falzon	Representative
Mr Anthony Falzon	Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Dr Charles Cassar Deputy Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Karl Tanti Legal Representative for Electro Fix Ltd stated that appellant had two grievances – the rejection letter was not clear and was contradictory and its offer was technically compliant – anything not clear could have been clarified.

Dr Leon Camilleri Legal Representative for the CPSU said that the reasons for rejection were clearly stated; namely that one box had been left blank in the technical offer form which comes under Note 3. The Tender Evaluation Committee (TEC) could not clarify something that did not exist. The literature is there to support the technical offer not to substitute it. There was an incomplete technical offer and no literature.

Dr Tanti requested that witnesses be heard.

Mr Stephen Mercieca (162469M) called to testify by the appellant stated on oath that he was the Chairperson of the TEC and detailed the names of the rest of the committee. He was not involved in the drafting of the tender. On evaluating the tender, the TEC noticed a deficiency in the bid which rendered it non-compliant. Item 3.13 in the Technical Offer Form was left blank. In item 3.14 bidder had replied 'yes' and made reference to two documents. Witness was referred to the two letters but stated that the TEC did not consider these as referring to Item 3.13 since they had been submitted under a different heading.

Dr Debono Legal Representative for the Department of Contracts (DoC) pointed out that the appeal was not on Item 3.14. Dr Tanti mentioned that the relevance of 3.14 is that those documents related to 3.13 and by mistake had both been adjoined to 3.14.

Resuming his testimony Mr Mercieca stated that both letters were considered by the TEC under Item 3.14 since that is how they were submitted. The letter of rejection was submitted by the DoC on the basis of the findings of the evaluation report. Once Item 3.13 had been left blank it was clear to the TEC that the bid was not compliant and was therefore rejected.

In reply to questions from Dr Camilleri witness confirmed that the box relating to Item 3.13 had been left blank and that the Technical Offer Form came under Note 3. The reason for rejection given to appellant was detailed. Appellant's submission did not confirm that they had a local maintenance facility.

Dr Maurice Meli Legal Representative for the preferred bidder asked if there was any indication in the submissions of a maintenance facility and was told by witness that there was no such indication.

Mr Joseph Schembri (377472M) called by the appellant testified on oath that his firm were experts in the installation of generators and that their suppliers had confirmed that they would make spare parts available as and when needed. In the BOQ submitted in their bid they had covered all parts and labour. One of the letters submitted under Item 3.14 was intended to refer to Item 3.13.

Questioned by Dr Meli, witness said that the letter referring to spare parts should have been part of Item 3.13.

Mr Franco Cassar (485666M) called to testify by the Contracting Authority stated on oath that he was a Mechanical Engineer and is the Chief Engineer at Mount Carmel Hospital. He was one of the Evaluators. He said that the technical offer clearly states that unless a

complete bid is submitted then it is not compliant. None of the letters submitted refers to a maintenance facility and therefore appellant's bid fails on both counts.

Questioned by Dr Tanti, witness re-iterated that the letters provided did not mention a maintenance facility which is equated to a workshop facility. The Authority required this assurance to ensure that it got the service when required. No indication was provided that such a facility exists.

This concluded the testimonies.

Dr Tanti said that there is a contradiction in the rejection letter. It is accepted that leaving the box in Item 3.13 blank made the offer not compliant but the rejection letter also states that the letters fail to satisfy the tender requirements. Whilst witness Mr Mercieca states that on evaluating Item 3.13 the evaluation stopped, in fact, reasons for rejection in requirements further than 3.13 were given. On this contradiction alone the deposit should be returned.

On the merits of the case, said Dr Tanti, the appellant claims that the TEC had a duty to request clarification to confirm that its offer was not only fully compliant but also the cheapest. Item 3.13 was not left blank intentionally but through an oversight which was redeemed through the two letters submitted in Item 3.14, one of which referred to 3.13. A clarification would have made appellant compliant. Witness Mr Cassar testified that the bid required support from suppliers and appellant provided this whether it mentioned maintenance facility or not.

Dr Debono stated that witnesses confirmed that specification 3.13 was not completed. There was no contradiction in the rejection letter as full details of the reasons were given. Due to Note 3 restrictions the TEC could not ask for rectification.

Dr Meli mentioned that the first grievance could not be considered since the rejection letter makes sense as it ties both the reasons for refusal. On the merits, the facts are that on the technical form point 3.13 was not completed and the matter could have stopped there. However item 3.14 was also not compliant as there was no indication of which of the letters referred to this point. It is not up to the TEC to guess what the bidder meant. Rectification was not permitted under Note 3.

Dr Camilleri stated that the grievance on the letter of refusal cannot be taken seriously as what was provided was more than necessary to explain the reasons. The TEC could have stopped at the failure to complete the box in 3.13 but they went further by giving additional reasons. *Ex-admissis* there was a mistake by the bidder and only a rectification, which was not possible, could have saved the bid as a clarification would not have solved the problem. Documents submitted are meant to substantiate statements made but they cannot substantiate something not declared. The tender has to be assessed on what is stated in line with the principle of self-limitation and the PPRs. The reason for refusal lies clearly in the fact that 3.13 was left blank and this was enough to disqualify. The appeal should be denied.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 2nd May 2024.

Having noted the objection filed by Electrofix Ltd. (hereinafter referred to as the Appellant) on 05th February 2024, refers to the claims made by the same Appellant regarding the tender of reference CT 2306/2023 listed as case No. 2004 in the records of the Public Contracts Review Board.

Having noted the letter of reply filed by the CPSU (hereinafter referred to as the Contracting Authority) filed on the 13th February 2024

Having heard the testimony of Mr Stephen Mercieca, Mr Joseph Schembri, summoned by the appellant and Mr Franco Cassar summoned by the Contracting Authority

Having evaluated the Minutes of the Board sitting on 2nd May 2024

Appearing for the Appellant:	Dr Karl Tanti
Appearing for the Contracting Authority:	Dr Alexia J Farrugia Zrinzo/Dr Leon Camilleri
Appearing for the Preferred Bidder	Dr Maurice Meli

Whereby, the Appellant contended that :

Firstly, the rejection letter was deemed unclear and contradictory.

Secondly, while acknowledging the technical compliance of the offer, any unclear aspects should have been resolved through clarification if any doubts existed.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 13th February 2024 and its verbal submission during the hearing held on 2nd May 2024, in that:

A) if the reason for rejection was not clear enough, as claimed, objector still managed to lodge a six page objection letter

B) the Tender Evaluation Committee (TEC) could have simply cited the failure to complete the box in clause 3.13 as grounds for rejection as this was a mandatory requirement. However, they chose to expand their evaluation and provided additional reasons. Box 3.13 had been left blank in the technical offer form, which came under Note 3. The TEC was unable to clarify something that was not presented in the offer. .

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, opines that :

admittedly, there was an error made by the bidder in omitting to complete box 3.13. Rectifications were not possible due to note 3 restrictions. A mere clarification wouldn't suffice to remedy the issue as submitted documents are intended to support declared statements, yet they cannot substantiate something not explicitly declared. Therefore, assessment of the tender

must adhere strictly to what is explicitly stated, in accordance with the principle of self-limitation and the Public Procurement Regulations.

The Board,

Having evaluated all the above and based on the above considerations, concludes, and decides:

- a) Does not uphold the Appellant's Letter of objection.
- b) Upholds the Contracting Authority's decision in the award of the tender.
- c) Directs that the deposit paid by the Appellant is not to be reimbursed

Dr Charles Cassar
Chairman

Ms. Stefanie Scicluna Laviera
Member

Mr Richard A Matrenza
Member