

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case No. 26**

#### **CT 2656/2004, Advertisement 308/2004 FTS C 16 – 04 Tender for supply, manufacture and fixing of Aluminium Apertures at the New Secondary School Karwija**

The call for offers, with an estimated value of Lm122,867 was published in the Government Gazette following a request received by the Director of Contracts from the Foundation for Tomorrow's Schools (FTS).

Eleven (11) offers were received of which eight (8) were adjudicated valid. The cheapest valid and most advantageous offer was the one submitted by Camray Co. Ltd., amounting to Lm90,818.75.

The Adjudication Board appointed by the contracting party analysed the offers received and, following a thorough evaluation, recommended that the Contracts Committee awards the contract to Camray Co. Ltd.

The Contracts Committee concurred with the Adjudication Board's recommendation and, following the publication of the award, Alu.Care Mosta Ltd. filed an objection with the Director of Contracts on 15.02.2005.

The Public Contracts Appeals Board constituted of Mr Alfred Triganza, Chairman, Mr Edwin Muscat, Member and Mr Maurice Caruana, Member, held a public hearing on 9<sup>th</sup> March, 2005 at the Department of Contracts, Floriana, to discuss the objection filed by Alu.Care Mosta Ltd against the decision by the Contracts Committee to award the tender in caption to Camray Co. Ltd.

During the public hearing, the following entities were represented as follows

#### **Alu.Care Mosta Ltd**

- Dr Ronald Aquilina LL.D
- Mr Stephen Fenech

#### **The Adjudication Board, Foundation for Tomorrow's Schools (FTS)**

- Mr Chris Pullicino (Financial Controller FTS)
- Mr Andrew Ellul (Senior Architect FTS)
- Mr Tano Zammit (Senior Architect FTS)
- Mr Leonard Zammit (Architect FTS)

Upon being invited by the Chairman to commence the introductory part of the proceedings, Dr R Aquilina, Alu.Care Mosta Ltd's legal representative, stated that although in their motivated letter of objection his clients based their appeal on three specific issues, yet, they wanted to place particular emphasis on the one relating to the samples submitted by Camray Co. Ltd, which according to his clients, did not conform to the specifications stipulated in the Tender Document.

The appellant's representative claimed that if the proper procedure had been followed and all pertinent matters addressed, Camray Ltd's bid would have been disqualified rather than recommended for acceptance.

Furthermore, Dr Aquilina claimed that, all things being equal, his client's tender would have resulted to be cheaper.

On the objection concerning the adequacy of the bidders' expected related experience as referred to in the Tender Document, Dr Aquilina contended that Alu.Care Mosta Ltd had vast experience in aluminium works while Camray Ltd had none.

Mr C Pullicino, Chairman, Adjudication Board, claimed that their technical representative had advised the said Board that Camray Ltd's tender was according to specifications. He thus failed to understand how the appellant arrived at the conclusion that the samples were not according to specifications. With regard to experience, he said that both the Adjudication Board and the Contracts Committee were satisfied that Camray Ltd were capable of carrying out all works through their sub-contractors.

Mr Leonard Zammit, an Architect by profession and member of the Adjudication Board, took the stand and referred to clause 4.1.1 – *Tender Conditions and Specifications*. He made particular reference to various instructions issued in the tender document, especially, Section 1.08, *Information which Tenderers must submit with their tender*. Mr Zammit said that according to clause 1.08.01, tenderers were requested to submit technical literature, brochures and samples. The latter consisted of (i) hardware such as handles for fanlights, handles and locks for doors and locks for sliding windows, (ii) assembled sections of a typical open fanlight, door and sliding window (iii) double glazing unit as per specifications and (iv) proprietary sealer for the sealing of joints between the aluminium frame and masonry blockwork.

The witness then made reference to the last sentence of clause 1.38 which stated "*Tenderers may visit the site of works to view a prototype sample room of what is required.*"

According to Architect Zammit, Clause 1.3.7 of the Specifications for Aluminium Units required that "*All apertures, particularly those operating on sliding mechanisms, shall be capable of adjustment to ensure proper fit and operation. Where fanlights are indicated, stainless steel friction stays should be provided.*"

Mr Zammit declared that, in his opinion, which was endorsed by the Adjudicating Board's, Camray Ltd's offer conformed to the Tender Specifications and requirements, namely with regards to the:

- submission of technical literature and samples of handles and locks;
- submission of a typical open fanlight and sliding window;
- technical literature accompanying aluminium sections to be used for all types of openings;
- submission of the sample of double glazed glass;
- submission of the sample of a proprietary sealer.

He said that all queries raised by the two Senior Architects during the adjudication stage were clarified.

Mr Zammit claimed that, as far as he was aware, Sun Aluminium Ltd, the designated sub-contractor, had vast experience in aluminium works and in the past had already worked with Camray Ltd on similar works.

During these proceedings Mr Zammit confirmed that he was directly involved in the preparation of the specifications, evaluation and recommendations.

Following specific requests by Alu.Care Mosta Ltd's legal representatives as well as this Board, the Foundation for Tomorrow's Schools' representatives brought the samples that were furnished by Camray Ltd. These included handles and locks, open fanlight, small window, sliding window, double glazed glass and a sealer.

While being cross-examined on issues concerning the supply of these samples by Dr Aquilina, Mr Zammit stated that although the handle fixed on the small window was not according to specifications, the appropriate handle (Cremonese) was submitted separately, a sample of which was demonstrated by the witness. Also, he said that the relative technical literature was submitted with the tender.

On the other hand, Mr Zammit declared that Camray Ltd did not submit a sample of the door. However, he proceeded by stating to those present that the technical literature accompanying the section of the aluminium to be used for the door, which was submitted with the tender document, was sufficient because the sample was mainly required for this purpose. However, at this stage, Dr Aquilina insisted that according to the tender conditions the tenderer had to present both the technical literature and the sample.

When questioned about the samples of assembled sections of a typical open fanlight, Mr Zammit stated that the most important thing was that the fanlight could be opened and cleaned.

With regard to the aluminium sections of the doors and windows, the same witness declared that the tenderer had presented technical literature supplied by the manufacturer.

Mr Zammit confirmed that the swivel windows (7C) was a type of window which tilted 180° from the centre. He declared that they did not request the tenderers to submit a sample of this type of window and that it was not required for the technical evaluation. In actual fact he said that the evaluation was based on the comparison of the tenderers' prices and their estimates.

In reply to Dr Aquilina's question about the double glazed glass, Mr Zammit declared that, according to the technical literature of the profiles, the open fanlights, doors and sliding windows could take double glazed glass. He confirmed that the samples of the fanlight and the large sliding window had a single glaze. Nevertheless, he contended that clause 1.08 did not specify that such samples had to be submitted with double glazed glass. He said that the sample of the double glazed glass was requested separately and, in his opinion, this was required mainly for its workmanship. However, Dr Aquilina and Mr Stephen Fenech stated that the specifications on the drawings specified that the double glazed glass had to be "*6mm tinted laminated Grey on the outside-8mm space-6mm*". They said that the thickness of the sample submitted by Camray Ltd was 22mm and that the colour of the glass was different. In view of this, Mr Fenech maintained that the sample of double glazed glass submitted by Camray Ltd was not according to specifications.

On a specific question by Dr Aquilina, Mr Zammit stated that (a) the prices of the glass varied according to the colour and (b) in view of the thickness of the double glazed glass it was not physically possible to install pre-formed EPDM or Neoprene gaskets on both sides of the glazing. However, Mr Zammit declared that, according to the technical literature made available to him, the aluminium profile thickness could take double glazing and that the 20mm was the minimum thickness required. Furthermore, he claimed that the actual double glazed glass would be ordered according to the profile available.

Mr Zammit proceeded by stating that in so far as regards the sample of the assembled section of the sliding window submitted by Camray Ltd, this was acceptable. Also he was satisfied that the profile presented by the tenderer could take double glazed glass and that this was according to the tender specifications. He quoted from clause 1.38 which stated that: *“In the case of a successful bid, the selected Contractor shall carry out full size samples of the elements to be supplied. Such sample areas shall be formally presented for the approval of the Architect-in-Charge, and once approved, shall be used as quality prototypes against which the quality of the work laid shall be checked. In the case of non-approval, the Contractor shall be required to re-submit samples and/or prototype areas, until both are to the satisfaction of the Architect-in-Charge.”*

During his testimony Architect Leonard Zammit declared that at evaluation stage he relied more on manufacturers’ technical literature rather than on samples. When asked to confirm whether the samples complied with the technical literature, Mr Zammit replied by stating that he was satisfied that the technical literature submitted by the tenderer conformed to the tender’s specifications.

Dr Aquilina requested the Appeals Board to view the technical literature submitted by Camray Ltd but this Board denied the appellant’s representative access in view of commercial interests involved. However, during the same proceedings it transpired that Mr Stephen Fenech was in possession of the same literature.

In reply to Dr Aquilina’s question regarding the contractor’s experience in aluminium works, Architect Leonard Zammit stated that Camray Ltd in his capacity of turnkey contractor, nominated a sub-contractor according to specifications.

Mr Zammit stated that although Camray Ltd’s experience in aluminium works was not specifically mentioned in the tender documents, he could confirm that the Company in question had submitted a list of 38 projects, including aluminium works, for which they were responsible in the past. At this stage, Alu.Care Mosta Ltd’s legal representative insisted that according to clause 1.08.9 tenderers were required to submit *“A detailed list of similar or larger projects for which the tenderer or his organisation was solely responsible.”*

In his testimony Architect Ellul confirmed that, as far as samples and technical documentation were concerned, he was satisfied with the procedure adopted in the technical evaluation of this tender.

When he was asked by Dr Aquilina to state whether he had noticed that the samples of double glazed glass and other apertures were not according to specifications, he replied by stating that the selected Contractor would ultimately still be required to submit prototypes thereof on site and these had to be according to specifications.

Mr Ellul declared that he was satisfied with the level of technical literature submitted in the same manner that he was also satisfied with the quality of apertures and double glazed glass submitted as samples.

When summoned to testify, Mr Tano Zammit, Senior Architect, declared that he was competent to evaluate the tender from the technical aspect and that he concurred with the conclusion of the technical report submitted by Architect Leonard Zammit. As far as the adjudication of this particular contract was concerned, Mr Zammit said that he agreed with the recommendations in the technical report which recommended that the cheapest tenderer would be eliminated because it was not according to specifications.

Architect Zammit opined that a tender was to be evaluated in accordance with the submission of the *bills of quantities* and not on the samples submitted because during the initial stages, the samples are there solely for guidance purposes. It is only in case of doubt that he would ever consider sending samples received by the pertinent authority for testing.

In his concluding submission, Mr Chris Pullicino stated that he had nothing to add because witnesses that took the stand had covered all technical points. However, he pointed out that three professionally qualified architects adjudicated the tender in question!

On his part, Dr Aquilina concluded his submissions by stating that from the evidence heard during these proceedings it clearly resulted that the samples submitted by Camray Ltd. were not according to specifications, in one aspect or other. The samples of the double glazed glass failed to conform to the requested specifications in respect of the glass' thickness, measurement and colour. He pointed out that Camray Ltd neither submitted the technical literature of the glass nor the sample of the door.

He did not agree with the Architects' argument when these stated that they had relied on the technical literature in the evaluation of the tender. He insisted that in view of the fact that Clause 1.08.01 stipulated that the tenderer/s had to submit samples of assembled sections of a typical open fanlight, door and sliding windows, such samples should have been given due consideration. He claimed that from the evidence given by the witnesses it emerged that the samples submitted by Camray Ltd did not comply with the tender specifications and drawings.

Thus, he insisted that, on this basis alone, Camray Ltd should be disqualified and that the tender should be awarded to the next cheapest offer.

Finally, Dr Aquilina remarked that clause 1.08.9 was purposely included to ensure that the tender be awarded to that contractor who had the necessary experience in aluminium works and to ensure that contractor supplied good quality products. He was of the opinion that the Adjudication Board did not give due consideration to the appellant's vast experience in aluminium works, particularly in school projects.

## **Conclusions of the Public Contracts Appeals Board:**

The Public Contracts Appeals Board,

- having considered the contestations put forward by the appellant in support of his motivated letter of objection dated 22<sup>nd</sup> February, 2005 through:- (i) his verbal submissions and (ii) the samples that were exhibited during the public hearing held on 9<sup>th</sup> March, 2005;
- having also heard the verbal evidence given under oath by the Contracting Authority's representatives, including particularly the detailed explanations and clarifications given by (a) Mr Leonard Zammit, the FTS Architect who was entrusted with the presentation of a Technical Report based on his technical appraisal of the tenders received, and (b) Messrs Andrew Ellul and Tano Zammit, (Senior Architects FTS), the two technical members comprising the Adjudicating Board which presented the final recommendations regarding the award of the tender to the bidder whose cheapest offer was certified as technically acceptable for final award;
- having satisfied itself that the technical-appraisal modalities which were adopted and which focussed primarily on the determination as to whether the samples, as supplemented by the corresponding technical documentation supplied by the bidders, did, in fact, represent the correct adjudication procedure to be applied in the context of this particular procurement;
- having also satisfied itself that the information provided by Camray Ltd, in evidence of this tenderer's experience in similar projects, was adequate and also sufficient for the purposes of supporting his claims;

did not find that there was any reasonable justification to disqualify the offer made by Camray Ltd, neither on technical grounds, nor for lack of experience in similar projects, and, in consequence, decided to dismiss Appellant's claims that Camray's tender should not be considered for final acceptance.

Consequent to these findings, the Board recommends that the deposit submitted by the aggrieved tenderers in terms of regulation 103 (1) should not be refunded once these failed, in every respect, to convince the Board that the decision to award the contract to Camray Co. Ltd. should be revoked.

**A. Triganza**  
Chairman

**E. Muscat**  
Member

**M. Caruana**  
Member

*17 March, 2005*