

PUBLIC CONTRACTS APPEALS BOARD

Case No. 28

RE: CT 2655/2004, Advertisement 309/2004, FTS C 15 - 04 Tender for Tiling and Marble Work at the New Secondary School, Karwija

The Public Contracts Appeals Board, consisting of Mr. A. Triganza, who chaired the proceedings, and Messrs. E. Muscat and M. Caruana (Board Members), met on the 9th March, 2005 and the 4th April, 2005 respectively to consider this appeal.

The call for offers was published in the Government Gazette on 2nd November 2004 following a request received by the Director of Contracts from the Foundation for Tomorrow's Schools.

Ten offers were received. However, the Adjudication Board, which was made up of Mr Chris Pullicino (Chairman) and Architects Andrew Ellul and Tano Zammit respectively, acting as the other members, drew a report dated 26.01.2005 wherein, *inter alia*, it was stated that "the technical report recommends the short listing of those tender submissions which included the technical literature and samples conforming to the tender specifications of those items of the tender bill that constitute the major part of the scope of the works. In this manner the list of potentially successful contractors is reduced to five, irrespective of the value of the tender submission. The five contractors, which have been short-listed in this process were:

- a. Agius Marble Works Ltd.
- b. Francesco Fenech Ltd.
- c. Josies Bathroom Co. Ltd.
- d. Camray Co. Ltd.
- e. B & M Supplies Ltd."

Following the notification of such recommendations, Messrs. A.F. Ellis (Home Décor) Ltd. formally filed an objection with the Director of Contracts on 20th February 2005, against the decision that their offer had been adjudicated as not complying with the tender specifications and therefore could not qualify for further consideration during the third stage (*financial proposal*).

The following persons were also in attendance during the public appeal hearings:

A.F. Ellis (Home Décor) Ltd

Dr Joseph Ellis

Adjudication Board

Mr Chris Pullicino (Chairperson)

Mr Andrew Ellul (Member)

Mr Tano Zammit (Member)

Witness (1st Session)

Mr Leonard Zammit (Architect Foundation for Tomorrow's Schools)

Witness (2nd Session)

Mr Giuseppe Azzopardi (Consultant Marmologist)

Dr Joseph Ellis, Company Director and legal representative of Messrs. A.F. Ellis (Home Décor) Ltd, started by stating that he was of the opinion that the Foundation for Tomorrow's Schools' Adjudication Board's reasons for discarding the Company's tender were not clear. The appellant said that one of the reasons mentioned in the technical report was that they submitted a full body tile. The Company's legal representative claimed that their tile conformed to the specifications, which he contends were amended during the course of this tender.

Dr Ellis said that Clause 1.2.1 of Addendum 2 to the published tender call emphasised that the "*Ceramic floor tiles shall be fully vitrified (impervious), full body, dry single-press fine porcelain stoneware (fine porcellanato).*"

According to the appellant, the technical report, drawn up by Architect Leonard Zammit, Stated, *inter alia*, that the appellant's offer was not accepted because the latter's offer did not meet the specifications referred to in *Material C1 (Addendum 2)* wherein fully vitrified fine porcelain stoneware tile was specified.

The appellant proceeded by stating that in the conclusions reached by the Adjudication Board it was also stated that the tenderer had failed to comply with the specifications because with regards to "... *part of Sample S3, where a fully vitrified fine porcelain stoneware tile 450mmx450mmx9mm thick (Material C1) for Item 1.02 and 1.07 was required*", the tenderer had submitted a full body gres tile.

At this stage, Dr Ellis argued that the specifications required a full body tile and in their report the Adjudication Board was stating that the Company's tile was not compliant because tenderer had submitted 'a full body gres tile'! He insisted that the contents in the technical literature accompanying the tender documents submitted by his Company, amply demonstrated that the tiles being offered fully complied with the Foundations' requirements and that any possible differences (if any at all!) between the original specifications and the amended ones, were negligible.

As regards Specification 1.2.2 included in Addendum 2, which specified that "*Ceramic floor tiles shall either be Glazed as indicated in the Bill of Quantities and/or the Drawings*", Dr Ellis claimed that this specification was incoherent because *gres tiles* could never be glazed. He claimed that when he visited the site he was told that the Foundation wanted a *gres tile*. The appellant proceeded by stating that he was of the opinion that the tile submitted by his Company was compliant to the specifications and compatible to the tile on site.

With regard to the wall tiles, Dr Ellis said that, according to the technical report, this type of tile did not comply with the tender specifications because the "*sample submitted is matt whereas glazed ceramic tile is required.*" He contended that they submitted a matt glazed tile. The Company's legal representative claimed that, had the Adjudication Board sought pertinent clarifications, his Company would have, indeed, found no objection to provide such explanations.

As regards the Bills of Quantity, Dr Ellis said that Item 1.02, which referred to "Supply, transport and lay 9mm gres ceramic floor tiles", was not amended when the Foundation issued fresh specifications. Thus, this implied, alleged the appellant, that the Foundation wanted gres floor tiles.

In view of the technical aspect being discussed, Mr Chris Pullicino, Chairman of the Adjudication Board, suggested that Architect Leonard Zammit should take the stand in order to give his testimony under oath.

Mr Zammit intervened and replied by stating that in view of the fact that in *Addendum 2* it was indicated that “*For ceramic floor tiles size 450mmx450mmx9mm the following specifications shall apply*”, the amendments applied also to the bills of quantities and drawings.

He testified under oath that, according to *Addendum 2*, tenderers were requested to submit ‘fine porcelain stoneware’ tile 450mmx450mmx9mm but AF Ellis (Home Décor) Ltd submitted a full body gres tile 300mmx300mmx9mm. He said that clause 1.2.1 specified that “*Ceramic floor tiles shall be fully vitrified (impervious), full body, dry single-press fine porcelain stoneware (fine porcellanato).*” Furthermore, Clause 1.2.2 specified that “*Ceramic floor tiles shall either be Glazed as indicated in the Bill of Quantities and/or the Drawing.*” He said that they included the word ‘glazed’ because they required a glazed full body tile, which meant that the tile had to be made of the same material throughout and having a glaze surface. He claimed that the tenderer was disqualified because the tile offered was not glazed.

Here, Dr Ellis intervened by stating that although the Foundation’s sample was of the *gres* type it was not glazed!

Architect Zammit reiterated that the surface of their sample tile was glazed to which Dr Ellis alleged that the specifications were incorrect because the tile, though being polished, was not glazed.

Mr Zammit said that the sample of this type of tile was physically on site and that tenderers were invited to visit the site of works to view a *prototype* sample room reflecting what was required. He claimed that the sample of tile on site was full body with a glazed surface.

Mr Zammit confirmed that AF Ellis (Home Décor) Ltd and the Foundation’s samples were both full body tiles. He said that in *Addendum 2* for Material Type C1 (Fine Porcelain Stoneware) no reference was made to *gres* floor tiles. However, Dr Ellis insisted that when they mentioned ‘Fine Porcelain Stoneware’ they were referring to ‘gres’.

Moreover, the appellant alleged that, although the word ‘gres’ was not mentioned, the specification pertained to *gres* tiles fully vitrified (impervious), full body, dry single-press fine porcelain stoneware (fine porcellanato). He claimed that the Foundation’s tile was a *gres* tile and that if it were to be tested, the results obtained would prove him right. Here, Mr Zammit broke a tile to demonstrate the glazing but Dr Ellis reiterated that it was not glazed.

In view of the outcome of these proceedings, the Board suspended the sitting to deliberate on the above. When the sitting resumed, this Board informed the parties concerned that, in exercise of the powers granted to it in terms of regulation 102 (8) of the Public Contracts Regulations, 2003 (Legal Notice 299 of 2003), it had decided to appoint an independent arbiter to establish whether:

- the sample submitted by the Foundation for Tomorrow’s Schools met the specifications and whether it was glazed;
- the sample submitted by appellant was according to specifications (except for size and glazing); and
- the specifications related exclusively to ‘gres’ tiles.

The parties concerned concurred with the above.

At this stage, the Chairman of the Public Contracts Appeals Board informed those present that they would be furnished with a copy of the arbiter's report as well as the date decided upon for the resumption of this hearing.

The hearing session was adjourned *sine die*.

When the hearing was reconvened on 4 April 2005, the Chairman, Public Contracts Appeals Board opened the meeting by stating that, in accordance with the terms agreed upon by the parties concerned during the previous sitting, this Board, albeit with some difficulty, appointed an independent formally qualified arbiter without any conflict of interest to assess specific issues raised during the preceding session.

In this context, Mr Giuseppe Azzopardi, a Consultant Marmologist, was introduced to those present.

The Chairman, PCAB informed those present that Mr Azzopardi was selected in view of his academic and professional expertise and following the receipt of a declaration, duly signed by Mr Azzopardi, stating that he had no conflict of interest as regards this particular tender.

It was explained that the arbiter was provided with samples marked 'A' and 'B' as well as copies of both the tender documents and Addendum 2. The tiles were marked as such not to indicate to the arbiter the owners thereof.

During the hearing, those present were reminded that as agreed during the previous session, the tiles marked 'A' and 'B' belonged to the Foundation for Tomorrow's Schools and A.F. Ellis (Home Décor) Ltd respectively.

Apart from drawing up a report based on his findings and opinions, a copy of which was forwarded to all interested parties prior to the hearing, Mr Azzopardi was also requested to attend the second hearing session so that the relative parties would be given the chance to cross-examination him under oath.

When Mr Azzopardi was asked to comment on his findings vis-à-vis his terms of reference, he declared that sample marked 'A' was glazed. He explained that each mould where the mixture was put was pre-sprayed with liquid known as 'glazing' and when it was put in the furnace it would practically become one fusion. With regard to the sample marked 'B', he said that it was fully vitrified, which meant that the mixture itself was glazed. In fact, if it were to be broken, one would notice that the material was mixed with glazing. He was of the opinion that, strength-wise, the latter type of tile was highly recommended for heavy human traffic. However, in view of the fact that it was very matt it needed more maintenance.

During cross-examination, in reply to a specific question, Mr Azzopardi declared that both tiles conformed to specifications because they were both 'gres' *porcellanato* type of tiles. However, he said that tile 'B' was fully vitrified while tile 'A' was superficially glazed; the latter tile was more vulnerable than 'B' but for hygienic purposes tile 'A' was better. He also declared that for common parts he would prefer tile 'B' while for classrooms he favoured tile 'A'. He said that the tiles of type 'B' were usually used in cold countries, while those of type 'A' were used in countries having the same climatic conditions as that of Malta.

When asked by Dr Ellis to state whether tile 'A' was *full body* or not, the reply given by Mr Azzopardi was in the affirmative. He explained that it had all the necessary ingredients and characteristics of a full body tile. The appointed expert continued by saying that the only difference was in the technique used in the manufacturing process. However, Dr Ellis claimed that according to Italian experts consulted, tile 'A' was not considered as full body (Italians refer to it as 'piena massa'). Nonetheless, Mr Azzopardi insisted that it had all the ingredients and characteristics of a full body tile.

During his intervention, Architect Andrew Ellul said that tenderers had the opportunity to visit the site of works where they had indicated that the tile required for classrooms was that of type 'A' and that for corridors of type 'B'. Here, Dr Ellis contended that the tile that was on site was not exactly the same as exhibit 'A'.

Mr Ellul concurred with Mr Azzopardi's views that tile 'A' was the type of tile that was more ideal for classrooms than tile 'B'. In the bills of quantities they included two types of tiles, one for classroom and the other for corridors. The Foundation's representative claimed that they were being offered with the same type of tile for different spaces. He said that during adjudication, emphasis was made on the impervious quality of the tile as it had better characteristics for cleaning and maintenance purposes. Mr Ellul said that the water absorption from the surface of tile 'B' was higher than that of tile 'A'. However, Mr Azzopardi said that due to the fact that tile 'B' was fully vitrified, the latter had lower water absorption.

In his concluding remarks Architect Ellul said that during the adjudication of the technical report, their aim was to select the best product that was suitable for classrooms. He said that A.F. Ellis (Home Décor) Ltd.'s offer was eliminated in view of this reason. Mr Ellul was of the opinion that the best specification was the sample room that was made available on site as this had the exact type of tile that was required.

At this stage, this Board intervened and reminded Mr Ellul that one had to ensure that what one was invited to see had to correspond to the published specifications as stated in the tender documents.

Dr Ellis reiterated that the tile made available on site was not similar to exhibit 'A'. With regard to water absorption, the expert has confirmed that tile 'B' was better than 'A'. Apart from this, he claimed that the distinction in water absorption between the tiles for common areas and classroom was not reflected in the specifications.

After the public hearing was concluded, the Board proceeded with its deliberations and reached its decision:-

The Public Contracts Appeals Board,

- having noted that appellant's tender was adjudicated as non-compliant with the technical specifications, and consequently, in terms of regulation 102 (2) of the Public Contracts Regulations, 2003 (Legal Notice 299 of 2003), the remaining package in his tender offer (Package Three – commercial package) was discarded unopened since it was not considered eligible to pass on to the next stage of the tender procedure.
- having perused the contents of the Adjudication Board's recommendations dated 26th January 2005 addressed to the Director of Contracts;

- having noted that the Adjudication Board’s recommendations were based on the ‘First Technical Evaluation’ report dated 25 January, 2005 presented by Mr. Leonard Zammit, the Foundation for Tomorrow’s Schools Architect who was entrusted with the technical evaluation of the tenders received;
- having examined the reasons given by Mr. L. Zammit for not recommending the appellant’s tender for further evaluation, leading to the discarding of the tender, namely:-

‘..... *Tenderer has failed to comply with the Tender Specifications as regards:-
 (a) Part of Sample S3 where a fully vitrified fine porcelain stoneware tile 450 mm x 450mm x 9 mm thick (Material C1) for Items 1.02 and 1.07 was required. Tenderer submitted a full body gres tile.*

(b) Sample S7 where glazed and not matt ceramic wall tiles 200 mm x 200 mm x 6 mm (Material G) for Item 1.11 was required’

‘..... *Since this tender has failed on one of the major items of the tender (ie Item 1.02 – Floor Tiles) it is recommended that this tender be not given further consideration’.*

- having considered the objections put forward by the appellant in support of his motivated letter dated 20th February, 2005 through:- (i) his verbal submissions and (ii) the samples that were exhibited during the public hearing held on 9th March, 2005;
- having noted that the appellant was persistent in his claims that the items tendered fully complied with the technical specifications as communicated to all bidders in terms of clause 1.2.1 of “Addendum 2” , namely. “*Ceramic floor tiles shall be fully vitrified (impervious), full body, dry single-press fine porcelain stoneware (fine porcellato)*”
- having examined the report dated 29 March, 2005 presented by Mr. Giuseppe Azzopardi, the expert appointed by the Board in terms of Regulation 102 (8) of the said Public Contracts Regulations, 2003;
- having, during the cross-examination of Mr. Giuseppe Azzopardi held on 4th April, 2005, obtained under oath confirmation to the effect that the sample of the items offered by appellant in his bid fully satisfied the technical specifications quoted in terms of clause 1.2.1 of “Addendum 2” to the tender call;
- having also noted that the Contracting Authority, during the course of the proceedings, implicitly accepted the argument brought forward by appellant in the sense that the matter raised in terms of paragraph (b) where it was stated ‘*Sample S7 where glazed and not matt ceramic wall tiles 200 mm x 200 mm x 6 mm (Material G) for Item 1.11 was required’* was a trivial matter which could have been clarified through correspondence;
- having completed its obligations in terms of regulations 102 (6), (7) and (8) of the said Public Contracts Regulations, 2003, and, as a consequence, satisfied itself that the ‘Technical Package’ offered by appellant did not fail to comply with the

specifications and that, therefore, appellant's 'Package Three' (*commercial package*) should qualify for consideration along with the other short-listed tenderers;

decided to uphold the appeal and to recommend that the deposit made by Messrs. A.F. Ellis (Home Décor) Ltd. in connection with this appeal, be refunded in full.

A. Triganza
Chairman

E. Muscat
Member

M. Caruana
Member

7th April, 2005