

PUBLIC CONTRACTS APPEALS BOARD

Case No. 41

CT 2202/05, MMA C/15/96

Internal Finishing Works of Office Areas at the Maritime Trade Centre, Marina Pinto, Floriana

This call for tenders under the three-envelope procedure was originally published in the Government Gazette on the 28 January 2005. However, since all the submissions made were rejected, a fresh call was made in the Government Gazette on 29 March 2005 and, this, following a formal request made to the Contracts Department by the Malta Maritime Authority (MMA).

The global estimated value of the contract in question was Lm 445,000.

The closing dates for the call for offers were 17.03.2005 and 19.04.2005 respectively.

A total of six (6) offers submitted by different tenderers were analysed by the Malta Maritime Authority Tendering Committee.

Following the notification that their Company would not be among the selected tenderers in view of the fact that their offer was considered as non-compliant with tender specifications, Messrs **Vassallo Builders Ltd** lodged a formal objection on 12.07.2005.

The Public Contracts Appeals Board made up of Mr. Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr. Edwin Muscat, respectively acting as members, convened a public hearing on 03.08.2005 to discuss this objection.

Present for the hearings were:

Vassallo Builders Ltd

Mr Nazzareno Vassallo	(Managing Director)
Mr Jonathan Buttigieg	(Director)
Dr Aldo Vella	(Legal Representative)

Malta Maritime Authority

Mr Alfred Xuereb	(MMA Tendering Committee)
Architect Martin Farrugia	(MMA Tendering Committee)

After the Chairman's brief introduction, Messrs Vassallo Builders Ltd's representatives were invited to explain the motive leading to their objection.

Mr Jonathan Buttigieg started by stating that on 6th July 2005 the Contracts Department notified Vassallo Builders that they had been disqualified from the tender

issued for the internal finishing works at the Malta Maritime Trade Centre, Floriana. On the same day the appellant asked the said department to state the reason why their offer had been rejected. Such reply was given on 7th July 2005, and the contents revealed that the decision taken by the Contracts Committee was based on Architect Martin Farrugia's technical report wherein it was stated that the glazed doors and partitions offered by Vassallo Builders were not compliant with the specifications. He said that despite the fact that the value thereof was between 15 and 20% of the total tendered sum, the tender document contained only two pages of specifications about glazing units.

According to Mr Buttigieg, the specifications and Bills of Quantities (BOQ) required 30 minutes fire-rated tempered glass to be used throughout. No reference was made to *British Standards* in the tender document. During the tendering period the Malta Maritime Authority issued various addenda, two of which referred specifically to glazing items. *Addendum 1* which was issued on 14 February 2005 stipulated that glazing should comply with BS 6206 – Class B impact performance, whilst, on the other hand, *Addendum 3* was issued in response to a question raised by one of the contractors regarding partition Door Type PD 1.

The appellant's representative proceeded by stating that the Authority requested that the door in question should have a fire rating of 30 minutes and be designed as part of the proprietary partition. Also, they gave the contractor the option to use laminated glass provided it had a 30 minute fire rating and it being duly certified by the manufacturer.

Mr Buttigieg emphasised that his firm's grievance was further accentuated by the fact that the tender document did not make any reference to fire rating according to standards because the requested *Tempered Glass* did not fall under BS 6202 – Class B (which applied to Impact Resistance of Laminated Glass) or BS 6206 – Class B (which applied Impact Resistance of Wired Glass –Safety Glass), claiming in the process that the relevant specification for Tempered Glass was BS 6202 – Class A.

At this stage, the appellant's representative declared that it was impossible for anyone to achieve the requested 30 minutes fire rating for tempered glass because from reasonable research carried out by Vassallo Builders Limited, it transpired that such glass would reach only 20 minutes fire rating. Mr Buttigieg contended that specially tempered glass products could not withstand the '*hose stream test*' as it was not suitable for use in locations where there were sprinklers. In order to elaborate further on this particular issue, the appellants informed those present that during their research it became evident that the fire rating of 30 minutes could solely be achieved or surpassed, through the use of the types of glazing mentioned hereunder:

- (a) ***Polished wired glass*** (which was a 45-minute rated product, but only offered 25% of the impact resistance of standard tempered or laminated glass);
- (b) ***Transparent Ceramics*** (which, technically speaking was not regarded as glass, was a product which was extremely high in heat resistance and

thermal shock and where fire rating from 20 minutes to 3 hours can be obtained);

- (c) ***Transparent Wall Units*** (as specified in tender documents. These units carry fire ratings up to 2 hours.)

Mr Buttigieg explained how a specific product, manufactured by CGI International and called *Pyroguard Fire Glass*, was developed after 1993. This product uses a series of laminated glass sheets which make use of resin as an alternative to Polished Wire (typically found in the Wired Glass category). This laminated fire glass conformed to BS476 part 20 (FIRE) and BS6206 Class B (IMPACT).

Vassallo Builders Limited's representative reiterated that the specifications and BOQ could not be achieved because the 30 minute fire-rated tempered glass to meet the impact resistance outlined in BS 6206 Class B did not exist. Mr Buttigieg also stressed the fact that he was of the opinion that *Addenda 1 and 3* served only to confuse matters because there was no statement which superseded the Tender Specifications or BOQ. It was given to understand that the 30 minutes fire-rated tempered glass existed since the tenderer was given the option to use a laminated design provided that the fire rating was 30 minutes. He maintained that the specifications could only be met with a superior product and not with the requested tempered glass.

At this stage, Mr Buttigieg gave a chronology sequence of the events as far as this particular tender is concerned. The appellants claimed that on 17 March 2005 all bidders were disqualified *en block* because they failed to submit the correct samples and that the tender was re-issued on 1 April 2005. The closing date of the tender and the date of the opening session of the same tender were the same, namely, the 19 April 2005. In total, six tenderers submitted their bid for this three-envelope tender. A X Holdings was disqualified because they placed a document in the 2nd envelope, which should have been in the 3rd envelope while Messrs Hal Mann Ltd and Camray Co Ltd, respectively, failed to submit certain mandatory documents. Mr Buttigieg said that Hal Mann Ltd, after submitting the missing documents, was then considered as being eligible to pass on to the next stage of the tendering procedure.

Mr Alfred Xuereb, representing the Malta Maritime Authority, said that the addenda were issued at the tendering stage in accordance with *Clause 7 – Issue of Additional Documents* under *Instructions to Tenderers* of the Tender Document wherein it was indicated that '*If, arising from a question, it is necessary to vary the Tender Documents, then an Addendum will be issued with the above procedure.*'

Architect Martin Farrugia said that they requested a proprietary partition consisting of aluminium, doors and glass with fire rating of 30 minutes. In the specifications they requested tempered glass for doors and laminated glass for partitions provided that they achieved the 30 minute fire rating.

Both of Malta Maritime Authority's representatives explained how when one of the contractors (not the appellant) drew their attention to the fact that the 30 minutes fire

rating could not be achieved with tempered glass, it was decided to issue *Addendum 3*. It was indicated that they would accept another type of glass (laminated) provide that the partition Door Type PD 1 was designed as part of the proprietary partition. Also, tenderers were given the option to use a laminated glazed door of a similar design provided that it achieved the 30 minutes fire rating and was certified by manufacturer. According to the same Authority representatives, their employers always remained consistent in requesting the 30 minute fire rated glazing.

On cross-examination by this Board, Architect Farrugia said that all tenderers were requested to submit fire certificates of partitions. He said that the appellant did in fact submit a report prepared by *Warrington Fire Research* wherein it was indicated that they had tested a partition and three types of glass. According to Architect Farrugia, when Malta Maritime Authority referred the matter to Vassallo Builders so that the latter may indicate the type of glass they intended to use in the proprietary partitions, the firm in question mentioned the *Pyroguard* which had a 30 minute fire-rated glazing. However, they limited the use of this type of glass to particular items of the BOQ and left out those for major items pertaining to the glazed partitions and doors. He continued by stating that when the appellants were requested to clarify what type of fire-rated glazing they intended to use in the glazed door which formed part of the de-mountable partitions, they confirmed that they were proposing to use tempered glass 30 minute fire rating. Architect Farrugia declared that the appellants were excluded because they knew that it was not possible to achieve the 30 minute fire rating with this type of glass (tempered glass could only reach fire rating of 20 minutes), adding that other bidders were disqualified because they could not meet the specifications without increasing the rates.

Replying to a question by this Board, Mr Buttigieg said that at that stage they did not know that 30-minute fire rating could not be achieved with tempered glass. He explained that the fact that the Malta Maritime Authority had requested tempered glass it was to be assumed that it such specifications existed. However, Mr Buttigieg continued by saying that, during the adjudication of this tender, Vassallo Builders did actually confirm that they would have been able to supply the glazed partitions and doors in accordance with the specifications and BOQ because they did not want to be eliminated. Mr Buttigieg said that he was of the opinion that once the Authority wanted a proprietary system they should have specified the product name, provided relevant information and requested tenderers to provide that specific product or its equivalent.

At this stage, Architect Farrugia intervened and stated that they did not specify the product because it was a government tender and also because different manufacturers in Europe used different partition systems. Also, he pointed out that the minimum standard in the United States was a 20 minute fire-rating while that in Europe it was 30 minutes. He confirmed that two other bids were accepted because they gave them other products which met the 30-minute fire rating. He emphasised that the most important thing was that the 30 minute fire rating was achieved and that relative rates were not changed.

At this point, when specifically asked by this Board, the appellant's representatives declared that they could offer 30-minute fire rated glass without any variation in the contract price.

The *Public Contracts Appeals Board*,

- having noted the content of Architect Farrugia's technical report wherein it was stated that the glazed doors and partitions offered by Vassallo Builders were not compliant with the specifications;
- having also noted that during the tendering period the Malta Maritime Authority issued various addenda;
- having considered the fact that the Authority gave the contractor the option to use laminated glass provided it had a 30 minute fire rating and it being duly certified by the manufacturer;
- having taken note of the fact that the tender document did not make any reference to standards;
- having established that it was impossible for any tenderer to achieve the requested 30 minutes fire-rating for tempered glass;
- having favourably considered the issue raised by the appellant that *Addenda 1* and *3* respectively served only to confuse matters because there was no statement which superseded the *Tender Specifications* or *BOQ*;
- having considered the fact that the entity drafting the specifications should have been more technically prepared '*ab initio*' and not expect to have its attention drawn regarding the impossibility for potential tenderers to satisfy tender requirements;
- having recorder the fact that the Malta Maritime Authority's representatives had acknowledged during the hearing that any eligible tenderer could have been misled due to the ambiguous interpretation of the contents of the addenda introduced to original tender document, and that, as a consequence, they would find no objection for such parties to specifically offer requested alternatives which achieve the 30 minute fire-rating subject to relative rates originally quoted by tenderer not being subject to change;
- having acknowledged that the appellant had guaranteed that no variation in contract price will be made with revised offer in line with specifications mentioned in the addenda and as now clearly explained during the hearing;

agreed that,

- (a) Messrs Vassallo Builders Ltd should be reinstated
- (b) all other tenderers which had their offers previously rejected by the Malta Maritime Authority Tendering Committee for the same reason as that of the appellant should now be equally given another chance to participate in order for the tender procedure to ensure a level playing field amongst all of the eligible original participants.

In consequence, the Board has decided to uphold the appeal and has also concluded that, in terms of the provisions stipulated in the law governing these appeals, the deposit paid by appellant should be refunded.

A. Triganza
Chairman

A.Pavia
Member

E. Muscat
Member

17 August 2005