

PUBLIC CONTRACTS APPEALS BOARD

Case No. 43

CT 2604/2004, Advert No 301/2005, FTS C 10 – 04, Tender for Tools and Equipment (Plastic) for Technology Workshops in various Government Schools

This call for tenders, published in the Government Gazette on the 02.11.2004, was issued by the Contracts Department following a request transmitted to the latter by the Foundation for Tomorrow's Schools (FTS).

The closing date for this call for offers was 21.12.2004.

The Foundation for Tomorrow Schools appointed an Evaluation Board consisting of Messrs.

- Charles Spiteri (Education Officer Design & Technology)
- Andrew Ellul (Senior Architect FTS)
- Tano Zammit (Senior Architect FTS)

to analyse a total of four (4) offers submitted by different tenderers.

Although the global estimated value of the contract in question was Lm 70,600 the total value of accepted items amounted to Lm 109,017.

Following recommendations made by the Evaluation Board to the Contracts Committee for the latter to award the tender to Messrs Meranti Ltd, MCE Ltd filed an objection on 24.06.2005.

The Public Contracts Appeals Board (PCAB) made up of Mr. Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr. Edwin Muscat, respectively acting as members, convened a public hearing on 31.08.2005 to discuss this objection.

Present for the hearings were:

MCE Ltd

Mr Ivor Puglisevich
Mr Stefan Casha

Meranti Ltd

Mr Peter Vella

Foundation for Tomorrow's Schools (FTS)

Mr Chris Pullicino

Adjudication Board

Mr Charles Spiteri
Mr Tano Zammit

Following the Chairman's brief introduction, MCE Ltd's representatives were invited to explain the reason behind their objection.

Mr Ivor Puglisevich, representing MCE Ltd, started by stating that they were contesting the Evaluation Board's decision because

- (i) the price of their offer, namely Option 2 from Formech Ltd, was cheaper than that of the recommended tenderer, namely Meranti Ltd, by about Lm7,000; and
- (ii) their offer, not only met but went as far as to surpass the tender specifications.

In view of the fact that their tender was considered to be unacceptable because of the size handling plastic films and thickness, they decided to refer the matter to their supplier to review the specifications. The appellants reported that the Formech *Midi* Vacuum Forming machines complied with all aspects of the tender specifications. As a consequence, they did not see any reason why the tender was not awarded to them and so they requested the reconsideration of the decision.

Mr Peter Vella, representing Meranti Ltd, rebutted by stating that according to the Contracts Department and other information available to them, it resulted that:

- (i) Formech Ltd's letter dated 16 June 2005 referred to *Midi* model while the brochure was about a *Mini* model which surely did not meet specifications;
- (ii) according to published specifications, the vacuum former should have been capable of handling plastic films having dimensions 430mm by 480mm (rectangle) whilst the unit offered could handle film sizes of 430mm by 430mm (square) which could be important for school because of plastic wastage;
- (iii) according to Formech Ltd's website, *Midi* was capable of handling plastic film thickness of 5mm while according to specifications the thickness requested was 6mm; and
- (iv) their price could be higher than that of their competitor because theirs was completed with stand and casters.

With regard to point (iv) mentioned above, Mr Vella confirmed that this was not a requirement in the specifications.

Mr Puglisevich pointed out that according to the tender specifications the '*vacuum former shall be capable of handling plastic films having dimensions of 430mm by 480mm (or thereabout)*'. Furthermore, he clarified that the size of their vacuum former was 450mm by 450mm and not 430mm by 430mm as stated by Meranti Ltd's representative. With regard to the thickness of plastic he said that what was on the

website was irrelevant because the suppliers declared that the *Midi* could form up to 6mm plastic.

At this stage, Mr Charles Spiteri, a member of the Evaluation Board, was called to the witness stand wherein '*inter alia*' he clarified that the forming area had dimensions of 430mm by 430mm and that the handling plastic film size was 450mm by 450mm. He confirmed that the published specifications stipulated that the unit was to be capable of handling film sizes of 430mm by 480mm. Mr Spiteri said that by 'thereabouts' he understood that a small difference would be acceptable but the fact that the difference was 30mm, it was considered substantial. The witness proceeded by declaring that according to the literature submitted, the maximum material thickness was 5mm and not 6mm as requested in the tender specifications. Here, Mr Puglisevich intervened by declaring that the bid they had submitted under Option 2 was capable of handling plastic film with maximum thickness of 6mm.

Architect Tano Zammit testified that although this particular item was capable of handling plastic film thickness of 5mm, their Technical Consultant (namely, Eng. C Attard Montalto) concluded that the model offered was technically acceptable. However, in their opinion a difference of 1mm out of 6mm was considered substantial and that was why they overturned that decision. As regards the term '*thereabouts*' Mr Zammit said that this term was very generic and the board had therefore decided to be flexible on this issue. However, as regard the thickness the tender specifications had requested specifically a 6mm thickness and therefore they considered this as a failing issue.

Architect Zammit said that the model which complied with the specifications was *Clarke*, which, in this particular instance, was offered by both Meranti Ltd and MCE Ltd. However, the only difference was in the price because the model offered by the first was cheaper. When Mr Puglisevich was requested to comment about this statement, he said that this was irrelevant because they were discussing the offer regarding Formech Model *Midi* and not other options which were more expensive. He declared that in their offer they indicated that their model was capable of forming plastic having maximum thickness of 6mm according to tender specifications. However, Mr Zammit explained that the thickness in the BOQ (Option 2 – 6mm) did not conform to that indicated on the brochure (5mm).

With regard to the fact that MCE Ltd had erroneously submitted a *Mini* leaflet when lodging their objection, this Board verified during the hearing that appellants had actually submitted a *Midi* brochure with their offer.

In reply to a specific question by this Board, Mr Zammit declared that if the thickness was 6mm, in his personal capacity, he would have accepted the Formech Model *Midi* because the variations in the handling were acceptable.

In reply to the same question, Mr Spiteri said that he would also have had a problem with the size. Apart from this, the other size was more commercial. When asked why they were not specific about the dimensions, the same witness declared that he was not involved in the drawing of the specifications. However, he said that if there was a

tenderer who offered the requested size and the difference in price was not substantial, he would accept such offer. His attention was drawn to the fact that the difference in price was about Lm 7,000.

When Mr Zammit was asked by the PCAB to state why they did not ask for clarifications regarding the fact that the thickness on the leaflet was 5mm and on the BOQ was 6mm, he replied that although in the past there were instances when they had sought clarifications on conflicting issues, in this case such line of action was not taken because the difference in the thickness was substantial. Furthermore, taking into consideration the fact that on the brochure it was indicated that the material thickness was 5mm, they felt that they made a mistake on the BOQ.

On his part, Mr Spiteri said that they did not ask questions because the factory had confirmed the 5mm thickness on its brochure. Although he acknowledged that they could have asked the tenderer to clarify the matter, he felt that even the Company could have indicated that in spite of the 5mm thickness indicated on the leaflet they were offering 6mm.

In reply to further questions raised by this Board, relating to the difference in thickness between their offer and Formech Ltd's leaflet, Mr Puglisevich said that the Foundation for Tomorrow's Schools (FTS) were requesting a thickness which was not standard for them. Yet, their supplier confirmed that they could submit a customised order. At this point, when Mr Zammit asked if it would be offered at the same price, Mr Stefan Casha replied that the price they offered in the first place was for a 6mm thickness model.

In his final intervention, Mr Puglisevich said that contrary to what was stated by Meranti Ltd's representative about the stand and casters, the Formech *Midi* Vacuum Forming machine had interlock and a heavy duty machine trolley. However, he pointed out that this was not requested in the tender.

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

The Public Contracts Appeals Board,

- having noted Mr Spiteri's comments that by '*thereabouts*' he understood that a small difference would be acceptable but the fact that the difference was 30mm, it was considered substantial;
- having also noted Mr Puglisevich's declaration that the bid they had submitted under Option 2 was capable of handling plastic film with maximum thickness of 6mm;
- having considered that the *Technical Consultant* appointed by the same Foundation, namely, Eng. C Attard Montalto, had concluded that the model offered by appellant was technically acceptable even though the Evaluation Board had subsequently overturned that decision;

- having also considered the point raised by appellant relating to the fact that their model was capable of forming plastic having maximum thickness of 6mm according to tender specifications;
- having reflected on Mr Zammit's assertion as regards the fact that the thickness in (MCE's) BOQ (Option 2 – 6mm) did not conform to that indicated on the brochure (5mm);
- having also reflected on the fact that, when specifically asked by this Board why were clarifications not sought, Mr Zammit replied that although in the past there were instances when they had sought clarifications on conflicting issues, in this case such line of action was not taken;
- having further deliberated on the fact that on the preceding issue another witness, namely Mr Spiteri, subsequently testified that, in hindsight, the Evaluation Board could have asked the tenderer to clarify the matter;
- having also examined appellant's verbal statement that although the Foundation for Tomorrow's Schools (FTS) were requesting a thickness which was not standard for them, yet their supplier had confirmed that they could submit a customised order;
- having taken note of the fact that in their bid, the appellants had confirmed that the price they offered was for a 6mm thickness model;

agreed that, a clarification exercise would have been more appropriate and pertinent in this case as, whilst acknowledging the fact that, in general, documents accompanying a bid should corroborate the actual offer, yet it is quite clear that such an exercise would not have resulted in the Evaluation Board being seen as negotiating the offer but simply clarifying what seemed to be otherwise obvious and clear following the same clarification exercise, which exercise was resorted to in the past by other Boards appointed by the same Foundation.

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

9th September 2005