

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case 76**

#### **CT 2343/05, Advert No 221/2005 - Tender for the Supply of MODULAR ALUMINIUM SUSPENDED PLATFORMS for the RESTORATION UNIT**

This call for tenders, published in the Maltese Government Gazette on 03.06.2005, was issued by the Contracts Department following a request transmitted to the latter by the Ministry for Resources and Infrastructure on 24.05.2005.

The closing date for this call for offers was 11.08.2005 and the global estimated value of the contract was Lm36, 000.

Three (3) different tenderers were considered to be suitable for further consideration.

Following receipt by the appellants of a formal notification sent by the Director General Contracts of the recommendations made by the Evaluation Board, Messrs International Machinery Ltd filed an objection on 02.03.2006, against the intended award of the said tender to Messrs S.R. Services Ltd (Euro 90,283, equivalent to Lm 38, 758.49)

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 03.05.2006 to discuss this objection.

Present for the hearing were:

#### **International Machinery Ltd**

Mr Attilio Vassallo Cesareo  
Mr Saviour Coppini  
Prof. Ian Refalo  
Eng. Martin Pizzuto

#### **S. R. Services Ltd obo Secalt SA**

Eng. Ray Muscat  
Ms Sarah Muscat  
Mr Vince Muscat

#### **Ministry for Resources and Infrastructure**

Mr Francis A. Bonello

#### **Evaluation Committee**

Eng Philip Schembri - Chairman  
Eng Martin Grech - Member  
Arch Herman Bonnici Sen A&CE - Member

After the Chairman PCAB's brief introduction, Messrs International Machinery Ltd's legal representative, Prof Ian Refalo, was invited to explain the motive of their objection.

Prof. Refalo started by stating that Messrs International Machinery Ltd was aggrieved by the decision because, although his client's offer was the cheapest, the contract was awarded to Messrs S. R. Services Ltd acting on behalf of Messrs Secalt SA. Furthermore, Prof Refalo remarked that they were not informed why his client's offer was discarded.

The appellants' legal representative claimed that the tender specifications only requested tenderers to supply and deliver to site two modular aluminium suspended platforms and separate hoists. He maintained that it was not specified how these hoists were to be mounted. Prof Refalo argued that he did not think that Messrs International Machinery Ltd were excluded because of non-compliance because otherwise, in the letter dated 7 October 2005, they would not have been '*requested to confirm the price for the supply of additional arms to accommodate material hoist specified in the tender document as per clause A.06 page 4*'.

Mr Saviour Coppini, the appellants' Technical Consultant, reiterated that under clause A.06 *Platform Specifications* it was clearly specified that '*Each of the platforms offered shall include a separate hoist mounted at superior slope level, having a minimum loading capacity of 300kg for hoisting of masonry blocks and other material used by personnel working from the suspended platform*' and that it did not stipulate how these had to be mounted. He maintained that, in view of the inclination of the fortification walls, he anticipated a variety of difficulties, options and solutions to the type of mountings. However, Mr Coppini insisted apart from the fact that the tender was issued for the supply and not for the installation they offered exactly what was requested. He claimed that the counterweights available of 750kgs (30 counterweights of 25kgs each) were sufficient for the purpose.

Mr Coppini asserted that the structures offered by S. R. Services Ltd and International Machinery Ltd were the same because they were both manufactured by the same company.

Eng Philip Schembri, Chairman of the Adjudication Board, responded to the appellants' representatives' arguments by stating that it was not correct to state that installation was not part of the requirements of the tender because in paragraph A.01 *Scope of Works under Conditions of Contracts*, it was specified that '*.. this tender covers all works related to the supply, delivery, mounting, testing and commissioning of these platforms, and hoists together with the necessary training assistance.*' **Apart from this, in their letter dated 7 September 2005, Messrs International Machinery Ltd were requested to '*Confirm that price includes delivery to site, erection and commissioning as per clauses A/05, A.01 and A.02 of tender document and that no additional charges are incurred.*'**

He maintained that the fact that in the same letter the appellants were requested to '*Confirm that prices submitted include for the supply, commissioning etc of separate hoist as outlined in tender document and in particular (but not exclusively) in clause A.06*' indicated that they did not request a separate cost for the hoist.

Mr Schembri explained that the platforms, amongst other characteristics, needed to have *'a load capacity of 500kg or more and can accommodate up to six (6) persons together with material/equipment'* whilst the separate hoist of masonry blocks and material needed to have a minimum loading capacity of 300kg. He acknowledged that the separate arm was not an integral part of the tender specifications and that no information was given in the tender document about the mountings. However, as the hoist had to be used for the restoration of the bastions, they provided a profile and specifications thereof. Mr Schembri claimed that, in view of the fact that there were various combinations to be taken into consideration, the tenderers were required to provide a solution but it resulted that the option as originally offered by the appellants was not safe.

The Chairman of the Adjudication Board clarified that, on 7 September 2005, Messrs International Machinery Ltd were requested to submit additional information and clarifications to ensure that what was offered was according to specifications. However, in their reply dated 20 September 2005, Mr S Coppini wrote that *'We have also been informed that for safety reasons it is not recommended that this hoist be suspended from the same arm as that platform and TRACTEL recommended that an additional arm similar to the ones used for the platforms be added. The price for the supply of each of these arms complete with counterweights would be Euro 6,650.00 – Total Euro 13,300.'* This meant that the structure as originally offered did not meet the safety specifications because they needed to suspend the material hoist from an additional arm at an extra cost. He contended that this was unacceptable because one of the basic principles of the financial regulations was that the prices of the original offers could not be changed. Mr Schembri alleged that the appellants increased the price because they knew that in spite of such increase they would still remain the cheapest. It was stated that the price offered by S. R. Services Ltd on behalf of Secalt SA amounted to Lm38,758 and that of International Machinery Ltd amounted to Lm35,628 (Lm29,920 + Lm2854x2=Lm5,708) which was Lm3,120 cheaper.

In reply to a specific question by the PCAB, the Chairman Adjudication Board said that if Messrs International Machinery Ltd did not include that paragraph they would still have requested more information because the number and the weights given pertained to the counterweights of the platform and not to those of the hoist. However, Mr Schembri maintained that, irrespective of the counterweights, the most important thing was that the structure offered was safe. At this point, Mr Coppini intervened by stating that their firm was the most safety conscious company in Malta. He said that the platforms which at present were being used by the *Restoration Unit*, were supplied and serviced by their company and were also certified for safety. However, Arch Herman Bonnici, member of the Adjudication Board, remarked that the specifications of this tender were different from the previous one because this included the hoists.

On cross-examination by the PCAB, Arch Bonnici said that the separate hoists were needed so that the personnel working from the platforms would work more efficiently. He declared that both tenderers were requested to provide more information as to how they were going to mount the hoists since their proposals were not clear. He explained that Messrs International Machinery Ltd replied that in order to be safe they needed an additional arm at extra cost while Messrs S R Services Ltd confirmed that the extra arm with which they were going to mount the separate hoist was included in their original offer and so no additional cost would be incurred. Apart from this, the appellants did not submit the counterweight of the separate hoist.

During the hearing Mr Schembri presented two sets of questions to prove that the clarifications requested from both tenderers were identical.

Eng Ray Muscat, representing S. R. Services Ltd, affirmed that Secalt SA complied with the specifications. He explained that, following a site familiarisation visit by their foreign Engineer at tendering stage, it was decided to supply an additional arm to support the material hoist because they did not want to mount it with the same arms supporting the platforms. Eng Muscat said that Messrs Secalt SA tendered with Portafix III which had to be custom built for the Maltese bastions. He explained that the price would have been much cheaper had they not requested a *CE* Certified structure because the European certifications process was lengthy and expensive.

During the hearing, Eng Muscat presented a copy of the drawing of the structure that was submitted during the adjudication process.

In his concluding remarks, Prof Refalo said that his clients had offered what was requested, that is, the platforms and the separate hoists. He reiterated that the additional arm was not included in their original offer due to the fact that it was not specified in the tender. Therefore, Prof Refalo insisted that International Machinery Ltd should not be penalised for requesting an extra cost for the additional arm. The appellants' legal representative argued that another tender could have been issued for this specific item.

Mr Schembri said that, during the evaluation process, the Adjudication Board felt the need to request additional information and clarifications regarding the offers submitted. Arch Bonnici added that in their reply, the appellants declared that, for safety reasons, it was necessary to have an additional arm at an additional cost. He alleged that International Machinery Ltd did not quote for the hoist in their original offer. Mr Coppini intervened and categorically denied that they did not submit the hoist. To substantiate his point he made reference to pages 2 and 3 of their offer. He added that the arm was not offered in their original offer because it was not requested.

Eng Ray Muscat said that they submitted the Portafix III because it was in line with the specifications.

At this stage, the public hearing was brought to a close and the PCAB proceeded with its deliberations before reaching its decision.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 2 March 2006 and also through their verbal and written submissions presented during and after the public hearing held on 3<sup>rd</sup> May, 2006, had objected to the decision taken by the General Contracts Committee, formally communicated via a letter, informing them that the tender submitted by them was not successful;
- having considered the appellants' legal representative's claim that the tender specifications only requested tenderers to supply and deliver to site two modular aluminium suspended platforms and separate hoists maintaining that it was not specified how these hoists were to be mounted;

- having also noted Mr Coppini assertion that the structures offered by S. R. Services Ltd and International Machinery Ltd were the same because they were both manufactured by the same company;
- having also considered Eng Philip Schembri's arguments with regard to the fact that, in his opinion, it was not correct to state that 'installation' was not part of the requirements of the tender as the tender document intended to cover *'all works related to the supply, delivery, mounting, testing and commissioning of these platforms, and hoists together with the necessary training assistance'* as well as the fact that, in the letter (dated 07.09.2005), addressed to Messrs International Machinery Ltd, the latter were requested to *'confirm that price includes delivery to site, erection and commissioning as per clauses A/05, A.01 and A.02 of tender document and that no additional charges are incurred'*;
- having taken cognizance of Mr Schembri's acknowledgement of the fact that the separate arm was not an integral part of the tender specifications and that no information was given in the tender document about the mountings but that it was left to the tenderers themselves to provide solutions.
- having heard how Mr Coppini himself had written that their principals had informed them that *"for safety reasons it is not recommended that this hoist be suspended from the same arm as that platform"* and that they were recommending that *"an additional arm similar to the ones used for the platforms be added"* for an additional cost of 13,300, Euro 6,650 each making it obvious in the process that the structure as originally offered did not meet the safety specifications;
- having examined Mr Schembri's contention with regards to the additional charge levied by appellants at that stage of the tendering process went against the basic principles of the financial regulations which stated that the prices of the original offers could not be changed;
- having also assessed the observation made by Mr Schembri who stated that the appellants increased the price because they knew that in spite of such increase they would still remain the cheapest;
- having noted Architect Bonnici's remark that whilst Messrs International Machinery Ltd had stated that in order to be safe they had to add an additional arm at extra cost, Messrs S R Services Ltd confirmed that the extra arm with which they were going to mount the separate hoist was included in their original offer and so no additional cost would be incurred;
- having further considered Prof Refalo's claim that his clients, the appellants, had offered what was requested, namely, the platforms and the separate hoists, he also reiterated that the additional arm was not included in their original offer due to the fact that it was not specified in the tender;

reached the following conclusions:-

1. Evidence submitted, amply demonstrated that, whilst the offer tendered by the appellants was modified to reflect increase in price due to the introduction of an extra arm, the offer submitted by Messrs S R Services Ltd was not changed in substance as price remained the same despite the additional arm requested by beneficiary.
2. Clarifications, when sought, were aimed at placing everyone on a level playing field and this was, once again, abundantly made clear during the hearing.
3. This Board agrees with the claim made during the hearing that one cannot alter prices after submission of offer as this could give rise to serious doubts on the financial validity and the ethical grounds of the call for offers and the adjudication system in general.
4. The PCAB regards the attempt made by any bidder to place very low prices at the early stage of the adjudication process to allow for manoeuvring of prices at a later stage, to be nothing but a financial risk which the bidder is willing to take even though one should not subsequently expect the beneficiary to accept mutations to financial or any other parameters soon after, for example, clarifications are sought.

Consequent to (1) to (4) above, the Board upholds the decision taken by the Contracts Committee that appellants' tender should be discarded.

Furthermore, in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by appellants in terms of regulation 83, should not be refunded.

**Alfred R Triganza**  
Chairman

**Anthony Pavia**  
Member

**Edwin Muscat**  
Member

*May 18, 2006*