

PUBLIC CONTRACTS APPEALS BOARD

Case No. 152

Adv. No. 164/2008 - CT/2520/2007 - UM1229

Tender for the Supply and Installation of Electrical, Mechanical and Extra Low Voltage Services for the Extension of the Rector's Office at the Administration Building, University of Malta

This call for tenders was, for a contracted value of € 117,479.62 was published in the Government Gazette on 18.07.2008. The closing date for this call for offers was 28.08.2008.

Five (5) different tenderers submitted their offers.

On 01.04.2009 Central Power Installation Ltd filed an objection following against the intended awarded of the said tender to Megaline Ltd.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Edwin Muscat and Mr Carmel Esposito, respectively, acting as members convened a public hearing on 06.05.2009 to discuss this objection.

Present for the hearing were:

Central Power Installations Ltd (CPI Ltd)

Dr Kenneth Grima	Legal Representative
Mr Dimitri Petchenkine	Director
Mr Bernard Grech	Representative

University of Malta

Dr Oriella Degiovanni	Legal Representative
Dr Charmaine Grech	Rector's Representative

Evaluation Committee:

Ms Charlotte Attard	Chairperson
Mr C Spiteri A&CE	Member
Eng. J Bonnett	Member
Mr J Busuttil	Member
Mr Karm Saliba	Secretary

Megaline Ltd

Eng. Joseph J. Vassallo
Mr Emmanuel Abela

Department of Contracts

Mr Francis Attard	Director General
-------------------	------------------

After the Chairman's brief introduction, the appellants' legal representative was invited to explain the motives of the objection.

Dr Kenneth Grima, on behalf of CPI Ltd, the appellant Company, recalled that that was the second appeal that his client had to lodge with regard to the tender in question. Dr Grima pointed out the reason for disqualification given to his client was that in the original document the Company had failed to submit the programme of works and method statement, which were considered mandatory requirements according to the tender dossier. Dr Grima explained that the 'work plan and programme' Form 4.6.3 in Volume 1 Section 4 (page 58) of the tender document stated:

Note: The following details would be requested for information only; they would normally not be part of the award criteria. The contract would have specific requirements for the preparation, submission, review and amendment of work plans etc.

Dr Grima argued that, notwithstanding the clear wording of this note, which formed part of the tender document which was a legal document that bound both the tenderers and the contracting authority, the contracting authority considered those requirements as mandatory and, as a consequence, resorted to rejecting his client's offer.

Dr Grima called on the PCAB to examine whether, in the circumstances, the adjudicating committee acted correctly and fairly in rejecting his clients offer, which he claimed was both compliant and the cheapest.

The appellants' legal representative proceeded by quoting from the tender document (page 122):

Article 15: Seven days before intended commencement of any works the Contractor shall furnish a programme of works as the architect and project manager shall require.

Article 17: Seven days before intended commencement of any works the Contractor shall furnish such working drawings or information as the architect and project manager shall require.

Dr Grima argued that the programme of works was to be submitted by the contractor at a stage when the tender would have been awarded and not by the tenderer at bidding stage. He added that a tender had to be awarded to a bidder that was compliant, not 100% compliant, but substantially compliant, and that quoted the cheapest price.

Dr Grima also pointed out that at one stage, prior to his client's elimination, the contracting authority had asked his client to submit the work programme and method statement. However, despite doing so, the contracting authority informed his client that the submission of that documentation at that stage was in itself an admission that he had not submitted them with the original documentation and which consequently led to his bid being non-compliant.

Dr Oriella Degiovanni, on behalf of the University of Malta, referred to clause 4 – Information/Documents To Be Supplied by the Tenderer – sub-clause 4.1.4 (page 8) ‘Summary information about key elements of the tender and of the tenderer’s organisation’ and particularly to the second bullet that referred to ‘a draft work programme with brief descriptions of major activities (form 4.6.3) showing’. Furthermore, Dr Degiovanni also quoted the following from page 4 of the tender document:

In submitting a tender, the tenderer accepts in full and without restriction the special and general conditions governing this contract as the sole basis of this tendering procedure, whatever his own corresponding conditions may be, which he hereby waives.

The Chairman PCAB asked the adjudicating committee what it did understand with the note in Form 4.6.3 specifically: *The following details would be requested for information only; they would normally not be part of the award criteria* – stress was laid on the conditional term ‘would’ and ‘for information only’.

Ms Charlotte Attard, Chairperson of the adjudicating committee, under oath remarked that the adjudicating committee went by what was provided in section 4 ‘Information/Documents To Be Supplied by the Tenderer’ 4.1.4 which indicated that the draft work programme and a comprehensive method statement were to be supplied by the tenderer. Ms Attard added that the forms were regarded as a kind of guide to tenderers.

Mr Karm Saliba, secretary to the adjudicating committee, declared that in his view there was no contradiction because what was requested from the tenderer at tendering stage was a work programme indicating periods of time but not linked to specific dates. However, he continued saying that, following the award of tender, the contracting authority and the awarded tenderer would then attach specific dates to that work programme – as per articles 15 and 17.

The Chairman PCAB stated that the Board had to establish why the adjudicating committee judged the appellant on the basis of what was laid down in one section of the tender document whilst, concurrently, overlooking what was stated in another part of the same tender document and this, despite the fact that, in similar circumstances, one had to consider the tender document as a whole.

At this stage, Dr Grima made the point that for something that was requested ‘for information only’ and that it ‘would normally not be part of the award criteria’ his client was disqualified from the tendering process. He stressed that these were the only elements on which his client was rejected.

Ms Attard intervened to remark that since it was a works tender, the adjudicating committee considered the work programme as an important and mandatory requirement. She added that this information was requested by way of clarification and eventually submitted by the appellant Company. Ms Attard conceded that the wording used in Form 4.6.3 did not render the submission of that information as mandatory and that it was indicated that, normally, it would not to be part of the

award criteria, however, she informed the PCAB that the other tenderers had submitted this information.

Mr Saliba remarked that this part of the tender dossier had subsequently been amended for the purpose of future tenders. He added that they received this tender document from the Contracts Department. He further remarked that the Contracts Department had advised the contracting authority that one could not ask for the submission of a mandatory requirement. Mr Saliba and Dr Charmaine Grech (also representing the contracting authority) remarked that the adjudicating committee had asked the appellants to indicate where, in the tender documentation that they submitted, one could find the work programme and method statement because in document marked I 2 'Works Management Plan', the appellant Company had stated 'as detailed in our programme of works' and 'in our method statement' which in itself meant that the appellants were aware that the information had to be submitted. Mr Saliba added that, in their reply, the appellants did not indicate where this information had been originally submitted but instead submitted a work programme that, to his recollection, was to start on the 9th of May. He contended that, in his view, the tender document made it clear enough that this information was required because it was necessary for the contracting authority to know whether the tenderer would meet the target dates.

Mr Bernard Grech, representing CPI Ltd, stated that, normally, they would submit the works programme in the form of a chart with the original tender documentation but, for some reason that was not submitted in this particular instance.

Dr Grima argued that it was immaterial whether this information was submitted or not with the original documentation because the PCAB has already acknowledged that it was not clear that this information was mandatory because of the inconsistency in the wording used at different sections of the tender document. This was evident by the fact that the contracting authority has, subsequently, made the appropriate amendments, emphasised the appellants' legal advisor. Dr Grima contended that whether this information was submitted or not – which information his clients had already admitted that they did not submit - did not clear the ambiguity that existed in the tender dossier, which was a legal document. Dr Grima argued that, in this case, the bidder should take the benefit of the doubt.

At this point Mr Francis Attard, Director General (Contracts), confirmed that the tender document template used in this case was the same one used in other instances.

Dr Grech remarked that it could be the case that more appropriate wording could have been used but it could well be that in this case, the appellant Company had simply overlooked the submission of this information. In fact, Dr Grech continued, the appellants stated that, usually, they would submit this information.

On his part Dr Grima, whilst acknowledging that Dr Grech had made quite a clear point, yet, he added that it was irrelevant because it had been demonstrated that it was not clear that the information was a mandatory requirement. Dr Grima did not exclude the possibility that his client might have, inadvertently, left out this information from the original submission due to the amount of paperwork involved but his clients' main objection remained that the reason for excluding them was the

non submission of a requirement that could have well been interpreted as being not mandatory.

Finally, Mr Saliba concluded that, in his view, the tender document was quite clear, safe for what had already been said by Dr Grech, so much so that the appellants had made reference to this information in their original submission. Mr Saliba explained that the call for this tender was published in August 2007 and the relative work plan should have indicated 2007 dates. However, Mr Saliba continued, when the appellants were asked to indicate to which work programme and method statement they were referring, the appellant Company, eventually, submitted a work programme where the first bar chart indicated that the mobilisation was to be effected on 31.05.2009 which indicated that the work programme submitted had been recently drawn up.

On a direct question put forward by the Chairman PCAB, Mr Dimitri Petchenkine, a director of CPI Ltd, the appellant Company, stated that both the 'work programme' and 'method statement' were overlooked when the original documentation was submitted.

At this stage the public hearing was brought to a close and the PCAB proceed with the deliberation before reaching its decision.

This Board,

- having noted that the appellants, in terms of their 'motivated letter of objection' dated 08.04.2009 and also through their verbal submissions presented during the public hearing held on the 06.05.2009, had objected to the decision taken by the General Contracts Committee;
- having taken note of Dr Grima's exposition of his claims, particularly the issues relating to the fact that:
 - according to him, the reason for disqualification given to his client was that in the original document the Company had failed to submit the programme of works and method statement, which were considered mandatory requirements according to the tender dossier;
 - the programme of works was to be submitted by the contractor at a stage when the tender would have been awarded and not by the tenderer at bidding stage;
 - according to the same appellants' legal representative, a tender had to be awarded to a bidder that was compliant, not 100% compliant but substantially compliant, and that quoted the cheapest price;
 - the appellant company's work plan's submission, following a specific request made by the same contracting authority, was subsequently, considered as being non-compliant by the same contracting authority;

- his client was disqualified from the tendering process for something that was requested ‘for information only’ and that it ‘would normally not be part of the award criteria’;
- albeit not excluding the possibility that his client might have, inadvertently, left out this information from the original submission due to the amount of paper work involved, yet his clients’ main objection remained that the reason for excluding them was the non submission of a requirement that could have well been interpreted as being not mandatory
- having also taken note of Ms Attards’s statement which referred to the fact that (a) the draft work programme and a comprehensive method statement were to be supplied by the tenderer, (b) the forms were regarded as a kind of guide to tenderers and (c) since it was a works tender, the adjudicating committee considered the work programme as an important and mandatory requirement, adding that this information was requested by way of clarification and eventually submitted by the appellant Company;
- having heard Mr Saliba’s understanding and interpretation of the clauses included in the tender document;
- having also heard Mr Saliba remark that, albeit the appellant Company was aware that the information regarding the ‘programme of works’ had to be submitted, so much so that, in their submission, the appellants had indicated areas in their tender document where the adjudicating committee would have been able to find the work programme and method statement, yet, when requested to clarify, the appellants did not indicate where this information had been originally submitted but instead submitted a work programme that, to his recollection, was to start on the 9th of May;
- having also taken note of Mr Grech’s declaration that although his Company would, normally, submit the works programme in the form of a chart with the original tender documentation, yet, for some reason or other, in this instance, such documentation was not submitted;
- having taken full cognizance of Dr Grima’s argument that, regardless of the fact that, during the same hearing, his same clients had already admitted that they did not submit such information, it was immaterial whether the pertinent information had been submitted by the appellant Company or not with the original documentation as, considering everything, this did not clear the ambiguity that existed in the tender dossier, which, intrinsically, was itself a legal document;
- having also taken note of the fact that, according to the DG Contracts, the tender document template used in this case was the same one used in other instances;
- having thoroughly reflected on the fact that although the tender in question was published much earlier, yet the appellant Company, eventually, submitted a work programme where the first bar chart indicated that the mobilisation was

to be effected on 31.05.2009 which indicated that the work programme submitted had been recently drawn up and, definitely, not in line with tender requirements which would, undoubtedly, have had an earlier time window ... a theory corroborated by Mr Dimitri Petchenkine, a director of CPI Ltd, the appellant Company, who during the hearing stated that both the 'work programme' and 'method statement' were overlooked when the original documentation was submitted;

reached the following conclusions, namely:

1. The PCAB feels that the tender document was drawn up in a disjointed manner such that in (i) clause 4.1.4. the *work programme* and *method statement* were among the information that were 'to be supplied by the tenderer', whereas in (ii) Form 4.6.3, which elaborated on the *work plan* and *programme*, the terms used seemed to indicate that the submission of that information was not mandatory. In other words, one did not reflect the other.
2. This Board contends that the use of the term 'would', instead of 'are to' or 'have to', was inappropriately used and this could have led one to erroneously understand that the said information might have been required at a later stage. As a consequence, the PCAB feels that if the contracting authority required this information it should have made it amply clear throughout the tender document that it was mandatory for participating tenderers to submit such information. It is the opinion of this Board that this would have done away with any ambiguities that may have arisen.
3. Yet, regardless of the anomaly discussed in (2) above, the PCAB disagrees with the appellant Company's claim that the reason for being excluded was the non submission of a requirement that could have well been interpreted as being not mandatory, arguing that this type of tender document had been widely availed of on many occasions and, in all other instances, this information used to be submitted without fail and without the need for any clarification to be sought from the pertinent entity, and this, in spite of the inconsistent terminology used.
4. The PCAB still feels that (a) the contracting authority was justified in requesting any kind of information for whatever purpose it desired and that such information had to be furnished and (b) whilst there was general agreement that the terminology used in the contracting authority's tender document could be improved upon, yet, without any doubt whatsoever, it had also emerged during the hearing that this information was not supplied by the appellants.

At this stage the PCAB would suggest that the contracting authorities should avoid the use of unnecessary and incongruous terms in tender documents in the sense that, for example, in instances as the one discussed in this particular appeal, (a) either something was required, or it was not and that (b) no room should be left for different interpretations or for misleading statements.

As a consequence of (1) to (4) above this Board finds against appellants.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should be forfeited.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmelo J Esposito
Member

26 May 2009