

## PUBLIC CONTRACTS APPEALS BOARD

**Case No. 157**

**Advert No CT 112/2009 - CT 2014/2009 – FTS C 03-09**

**Tender for the Supply, Installation and Commissioning of a Photovoltaic System at the New Primary School, Pembroke**

This call for tenders was, for a contracted estimated value of € 126,135 was published in the Government Gazette on 06.03.2009. The closing date for this call for offers was 16.04.2009.

Thirteen (13) different tenderers submitted their offers.

On 25.05.2009 Solar Solutions Ltd filed an objection against the intended awarding of the tender in caption to Electrofix Ltd.

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 01.07.2009 to discuss this objection.

Present for the hearing were:

**Solar Solutions Ltd**

Mr Jesmond Farrugia  
Mr David Zammit

**Electrofix Ltd**

Dr Adrian Delia LL.D.      Legal Advisor  
Dr John L. Gauci LL.D.      Leagl Advisor  
Mr Joseph Schembri  
Ms Deborah Schembri

**Foundation for Tomorrow's Schools**

Ing Albert Ellul              Technical Adviser  
Mr Ivan Zammit

*Adjudication Board*

Mr Charles Farrugia          Chairperson  
Mr Chris Pullicino            Member  
Mr Leonard Zammit          Member

**Contracts Department**

Mr Mario Borg                Asst Director Post Contracts

After the Chairman PCAB's brief introduction, the appellants' representatives, namely Solar Solutions Ltd, were invited to explain the motives of their objection.

Mr David Zammit, representing Solar Solutions Ltd, explained that they had submitted their objection because they did not agree with the Foundation for Tomorrow's Schools' (FTS) decision to award the tender to Electrofix Ltd on the basis of three issues, namely, (a) magnitude, (b) warranty and (c) because their offer was the most compliant and cheapest.

Mr Zammit claimed that FTS's decision went against the *Tenderers Check List's* provisions, wherein it was specifically stated:

*'Vide 1.08.4 – I confirm that I/We have submitted sufficient evidence that we have carried out works of a similar nature and magnitude as those being proposed in order for you to be in a position to assess whether we are technically and financially capable of carrying out the proposed works (Annex IV – List of Similar Projects)'*

He said that from information available the recommended tenderer had never carried out projects of a similar nature and magnitude.

Solar Solutions Ltd's representative claimed that FTS's decision also went against the provisions of Clause 3.04.4 of the tender technical specification which specified that '*... During the first two (2) years, the PV panels shall remain at 100% performance of original conversion efficiency*'. He contended that this tender requirement was anomalous because (i) it was technically impossible for any manufacturer to give such warranty and (ii) it was inconsistent with the technicalities of this project.

When Mr Zammit was asked by the PCAB to state whether he had ever drawn the contracting authority's attention about the matter before their participation in this tendering process, the reply given was in the negative. However, it was explained that he became aware of this matter when he was trying to find out the reason why their offer was discarded.

Mr Zammit alleged that the goal posts were changed during the evaluation process. At this point the PCAB intervened and drew the appellant's representatives' attention that, considering the fact that others had qualified, it was being understood that such warranty was given.

Mr Zammit sustained that, in the appellant Company's opinion, they had the most compliant and cheapest tender taking into account the fact that no one could give such warranty.

Mr Charles Farrugia, Chairperson of the Adjudication Board, responded by stating that Solar Solutions Ltd were not disqualified for the above mentioned reasons but because they did not submit the whole tender document.

Mr Chris Pullicino, a member of the Adjudication Board, explained that all tenders submitted were adjudicated on the basis of an *Award Criteria Schedule* in the tender. He confirmed that, apart from the said 100% warranty, Solar Solution Ltd's tender was (a) found to be technically compliant and (b) the cheapest. However, during the adjudication process, it was noted that they did not submit the general conditions of tender with the tender document.

In reply to a specific question by the PCAB, Mr Pullicino confirmed that none of the tenderers had given the requested 100% warranty.

Mr Farrugia pointed out that Clause 1.13.1 under Clause 1.13 – Proper Compiling of Tender Documents specified that:

*No alterations (other than filling in the blanks intended to be filled in) are to be made in the Tender Form and in other sections of the Tender Documents which shall be submitted intact with the items in the Bill of Quantities...*

Mr Zammit intervened to state that they had signed their acceptance as regards the said documents on the apposite form of tender.

However, Mr Pullicino said that they had been given instructions by the General Contracts Committee that if a complete tender document was not submitted, it would have to be considered as submitted *not intact* in terms of the above clause, and, as a result, could not be considered any further.

Dr Adrian Delia, legal representative of Electrofix Ltd, pointed out that the General Conditions were an intrinsic part of the tender document which was listed as one of the documents under Clause 1.09.1 which specified that:

*The following documents form, inter alia, the basis for the Tender and are hereinafter referred to as the "Tender Documents"*

He argued that in the instance where a tenderer would extract part of the *Tender Document* that should never be considered as a complete document submitted in line with tender requirements.

Mr Zammit responded by stating that, on the basis of the same argument, a tenderer who did not provide something that was specifically requested in the tender document, should have likewise been disqualified because this meant that they were not fully compliant.

Mr Jesmond Farrugia, also representing the appellant Company, said that they had fully complied with the provisions of Clause 1.09.2 of the tender conditions which specified that '*... Tenderers shall use complete sets of Tender Documents in preparing and submitting their Tender...*' He argued that this clause did not request tenderers to submit

the documents that were listed as “Tender Documents”, including the *General Conditions*, but to make use of such documents which they did because they had purchased the tender document.

Furthermore, the same appellants’ representative pointed out that, on the basis of the fact that Clause 1.13.7 specified that a tender ‘*may be rejected*’ and not “*shall be rejected*”, the rejection was not automatic but left entirely at the discretion of the FTS, the contracting authority.

Mr Jesmond Farrugia also claimed that it did not make sense for public funds to be burdened unnecessarily on the basis that they did not submit the General Conditions with the tender document considering the fact they were the most compliant and the cheapest.

Replying to a specific question by the PCAB, Mr Pullicino declared that the 100% warranty was a mandatory requirement as stipulated in the provision of Clause 3.04 of the *Specifications for Photovoltaic System* which specified that:

‘... During these first two (2) years, the PV panels shall remain at 100% performance of original conversion efficiency.’

He confirmed that none of the tenderers complied with this requirement.

When the PCAB asked FTS’s representatives to indicate who had directed to either reduce or not to calculate the 100%, the Chairman Adjudication Board replied that this was a technical issue and the Engineer was of the opinion that the requested technicality was a little bit excessive.

At this point the PCAB pointed out that, once again, the said Board was facing a situation where no one bothered to check if the tender specifications were workable before a tender was issued. The PCAB opined that they failed to understand how the maximum limit of 100% was arrived at when it was being alleged that it was humanly impossible for anyone to comply with.

It was also stated by the PCAB that another issue of concern was that there could have been other prospective bidders who had opted not to participate and decided not to submit their offer because of this mandatory requirement.

At this stage it was decided to call Mr Chris Pullicino to the witness stand because Dr Delia sustained that his client had submitted the 100% warranty. Mr Pullicino gave his testimony under oath.

When the witness was asked by the PCAB to state whether any of the participating tenderers had declared that they could submit the 100% warranty, the reply given was in the negative. Dr Delia intervened by stating that his client had submitted a signed document to this effect. However, Mr Pullicino explained that for every tenderer they had prepared a table wherein they included the % warranty under a column with the

heading 'As submitted' by the tenderer and another one in accordance with manufacturer's document. From this exercise, explained the witness, it resulted that the *manufacturer's guarantee* submitted by Electrofix Ltd, it was evident that up to the 12<sup>th</sup> year the guaranteed factor was 90%, with 80% thereafter.

Yet, on further questioning, the witness confirmed that

- (i) the yearly efficiency percentage and the 100% warranty requested were not the same
- (ii) the 100% warranty for the first two years was submitted by the tenderer
- (iii) such warranty had to be submitted by the manufacturer and not the tenderer

Dr Delia insisted that Electrofix Ltd had submitted the necessary documentation, namely the manufacturer guarantee and a signed declaration by the tenderer, as specifically requested in Clause 3.04.4 whereby it was stipulated that:

*'The PV panels shall be fully guaranteed by a manufacturer generic guarantee for the first five (5) years. This guarantee will be used should the percentage (%) of efficiency mentioned in the "DECLARATION OF COST EFFICIENCY OF PHOTOVOLTAIC SYSTEM" (attached in the BOQ) not be met by the photovoltaic system. During the first two (2) years, the PV panels shall remain at 100% performance of original conversion efficiency'.*

It was explained that the *100% Yearly Efficiency* was already written down against the first two years and that it was specifically requested that the 'Declaration of Cost of Efficiency of Photovoltaic System' was to be filled in by the tenderers and not the manufacturers. Mr Pullicino confirmed that such declaration was signed by Electrofix Ltd.

At this point, the PCAB made observations regarding the decision taken by the same adjudication board (previous sitting) whereby a tender was rejected and not even considered because the latter submitted unsigned documentation. The Chairman PCAB placed emphasis on the fact that it was imperative for an adjudication board to be consistent throughout the decision making process.

When Mr Zammit remarked that Solar Solutions Ltd had also signed such declaration, his attention was drawn by the PCAB that they were not excluded because they did not give the *100% warranty* but because they did not submit the general conditions with the tender. Replying to this claim, the appellants' representative remarked that this was due to the fact that they did not know the reason why they were excluded. At this stage, the PCAB observed that an appeal had to be submitted on the basis of a grievance and therefore, before filing an objection, a tenderer had to enquire why one would have been excluded.

The PCAB also pointed out that the appellants' appeal did not reflect the actual reason why they were excluded.

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Following the said claims, Mr Zammit replied that, in their objection letter, they stated that no manufacturer could give the said warranty.

Once again, the PCAB interjected to ask Mr Pullicino to state exactly why the appellant Company's offer was rejected. The reason given by Mr Pullicino was that the appellant Company did not submit a complete document. It was also pointed out that previously the adjudication board had also confirmed that the appellants' tender was technically compliant and the cheapest.

When asked to state why they did not submit the general conditions of tender, Solar Solutions Ltd's representatives said that they had declared their acceptance to the said conditions by signing the relative form of tender.

Dr Delia intervened to remark that, although the appellants had signed for the general conditions, yet, in his opinion, the fact that they did not submit them with the tender document implied that they were not accepting them.

At this point the PCAB's Chairman stated that in the tender dossier there were certain conditions which were mandatory and, therefore, in such instances, tenderers had to fully abide by them. He said that, although certain decisions were to be made in a subjective manner, there were certain borders beyond which no leeway was possible. However, he also sustained that, whilst he believed in issues to be approached in a pragmatic way, yet, he would be the first to be against a situation where he, as a decision maker, would be given leeway whereby he would be allowed to continuously make subjective judgments.

The Chairman PCAB added that, in this particular case, one had to establish whether the submission of the general conditions with the tender document is considered mandatory and, if in the affirmative, what would be the scope behind its submission. The PCAB argued that the fact that a tenderer signs for receipt of a tender document upon its collection does not necessarily mean that such tenderer would automatically be accepting the contents thereof - such confirmation, argued the PCAB, would only be corroborated by the tenderer submitting a copy of the general conditions in the apposite tender document or by explicitly declaring within the tender document that one is in total agreement with all the terms and conditions governing the tender document.

When, once again, Mr Jesmond Farrugia remarked that no manufacturer could provide the 100% guarantee, his attention was drawn by the PCAB that it had been established that they were not excluded because of magnitude, warranty or because they were not compliant and the cheapest but because they did not submit the general conditions with their tender.

Mr Zammit responded by stating that although he concurred with this, however, considering the fact that no tenderer was fully compliant with such a mandatory requirement, one would have to ask if the tender could be awarded or if the process was valid or not.

In reply to a specific question by the PCAB, Mr Pullicino declared that they did not have any reservation on the appellants' magnitude and competence to carry out the works.

At this point Mr Jesmond Farrugia insisted that the recommended tenderer had never installed such a system of this magnitude. This remark was followed by the PCAB's explanation that, in this particular instance, the purpose of this hearing was not for interested parties to discuss whether other tenderers were technically compliant or not because such evaluation had already been carried out by the Adjudication Board. The PCAB also pointed out that its function was to establish if, for the purpose of equity and transparency, (a) the exclusion of appellants would have been justified or not and (b) the evaluation process would have been properly carried out.

The appellants' representatives reiterated that they were not informed why their tender was rejected. The PCAB advised that an appellant should never file an objection without knowing the reasons why they were excluded and that it was their right to know why their tender was discarded. Mr Mario Borg, Asst Director Post Contracts at Department of Contracts, intervened by stating that any tenderer who felt aggrieved by a proposed award had a ten (10) day period within which to file an objection and if the appellants had submitted a written request within this period to the Department of Contracts, they would have been furnished with the reason/s for them being excluded from the said call.

Dr Delia concluded by stating that, procedurally and technically, the objection filed by Solar Solutions Ltd could not be considered because they did not submit a request to be re-instated in the process and did not object to their disqualification. He said that, in actual fact, in their letter of objection, they were only requesting the PCAB to consider the tender null and void alleging that no tenderer had complied with the requested technical specifications.

The PCAB said that the appellants had to be careful in stating that none of the tenderers was fully compliant because, in the prevailing circumstances, once it had been stated that they had also submitted such a declaration, this meant that their declaration was misleading.

Mr Zammit remarked that the statement made in their letter of objection had worked against them. The PCAB intervened and pointed out that the issue that a manufacturer could not give a guaranteed output of 100% for the first two years should have been raised before the submission of tender.

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 25.05.2009 and also through their verbal submissions presented during the public hearing held on the 01.07.2009, had objected to the decision taken by the General Contracts Committee;
- having taken note of the fact that appellants had submitted their objection because they did not agree with the Foundation for Tomorrow’s Schools’ (FTS) decision to award the tender to Electrofix Ltd on the basis of various issues, namely, (a) magnitude, (b) warranty - *claiming that the 100% warranty requested by the contracting authority was impossible to attain due to the fact that it was technically impossible for any manufacturer to give such warranty* - (c) because their offer was the most compliant and cheapest, (d) contrary to what had been contended by the adjudication board, they had signed their acceptance as regards the said documents on the apposite Tender form, and (e) all tenderers who desist from providing something that is specifically requested in the tender document should be similarly disqualified;
- having also taken note of the fact that the appellants’ representative claimed that the goal posts were changed during the evaluation process;
- having also heard the appellants’ representatives state that in their motivated letter of objection they had quoted reasons which they believed were the reason for their disqualification and not which were officially quoted to them;
- having heard representatives of the adjudication board state that - (a) Solar Solutions Ltd (the appellants) were not disqualified for any of the reasons they quoted in their motivated letter of objection but solely for not having submitted the whole tender document with their offer, i.e. they omitted to include the general conditions of tender with the tender document - (b) Solar Solution Ltd’s tender was found to be technically compliant and the cheapest – (c) none of the tenderers had given the requested 100% warranty – albeit the 100% warranty was a mandatory requirement as stipulated in the provision of Clause 3.04, yet none of the tenderers complied with this requirement;
- having taken full cognizance of the fact that the adjudication board confirmed that (a) the yearly efficiency percentage and the 100% warranty requested were not the same, (b) the 100% warranty for the first two years was submitted by Electrofix Ltd, another interested party / tenderer, and that a declaration was signed by the same firm (Electrofix Ltd.) in regard, and (c) such warranty had to be submitted by the manufacturer and not the tenderer;
- having established that the condition made in the Tender document, namely the one relating to 100% warranty, was considered to be a little bit excessive by one of the contracting authority’s own technical advisors;

- having also heard Dr Delia's arguments, especially those in relation to the fact that
  - (a) the General Conditions are an intrinsic part of a tender document and that no tenderer should be allowed to extract any parts of the said Tender document, and
  - (b) Electrofix Ltd had submitted the necessary documentation, namely the manufacturer guarantee and a signed declaration by the tenderer, as specifically requested in Clause 3.04.4;
- having also taken note of Mr Jesomond Farrugia's claim that the fact that they had purchased the tender document provided enough evidence that they (the appellants) were in total agreement with its content;

reached the following conclusions, namely:

1. The PCAB observes that an appeal has to be submitted on the basis of a grievance and, therefore, before filing an objection, one has to enquire why one, say, would have been excluded. The PCAB feels that the appellants' appeal did not reflect the actual reason why they were excluded.
2. The PCAB fails to agree with appellants' claim that the goal posts were moved throughout the evaluation process.
3. The PCAB feels that appellants had to be careful in stating that none of the tenderers were fully compliant because (a) this was proved to be an erroneous interpretation of facts and (b) in the prevailing circumstances, once it had been stated that they had also submitted such a declaration (regarding the efficiency guarantee), this meant that their declaration was misleading.
4. The PCAB feels that the fact that a tenderer signs for receipt of a tender document upon its collection does not necessarily mean that such tenderer would automatically be accepting the contents thereof. The fact that part of the document containing certain conditions is not submitted, whether knowingly or not, could only be taken to mean that the tenderer does not wish to be held responsible for the fulfillment of such conditions.
5. The PCAB concludes that in any tender dossier there are certain conditions which are mandatory and, therefore, in such instances, tenderers have to fully abide by them, regardless of whether they are in agreement with content or not. Although certain decisions should be made in a subjective manner, there are certain borders beyond which no leeway is allowable.
6. The PCAB recommends that all evaluation / adjudication exercises should be based on, *inter alia*, a high degree of consistency. In this particular instance, the PCAB observes that such consistency with previous decisions taken by the same Board proved to be lacking.

7. The PCAB fails to understand how, once again, the said Board (PCAB) is facing a situation where, before a tender is issued, no one bothers to check if the tender specifications are manageable and / or pertinent.

Having given due consideration to points (1) to (7) 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 not be reimbursed.

Alfred R Triganza  
Chairman

Anthony Pavia  
Member

Edwin Muscat  
Member

*17 July 2009*