

PUBLIC CONTRACTS APPEALS BOARD

Case No. 178

TD/T/28/2009

Supply of Road Lighting Lanterns 70W

The closing date for this call for tenders which was for a contracted estimated value of € 65,550 was 26.05.2009

Fifteen (15) different tenderers submitted their offers.

On 22.10.2009 *Messrs* E. Calleja & Sons Ltd filed an objection against the decision by the Contracts Department to disqualify its offer on being found technically non-compliant and to recommend the award of tender to Grechi Illuminazioni srl.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Carmel Esposito, respectively, acting as members convened a public hearing on 16.12.2009 to discuss this objection.

Present for the hearing were:

E. Calleja & Sons Ltd

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| Mr Stephen Calleja | Managing Director |
| Mr Anthony Magro | Engineer |
| Mr Fabian Mallia | Engineer |

Grechi Illuminazioni SRL

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| Dr Franco Vassallo | Legal Representative |
| Mr Roberto Ragonesi | |

Evaluation Board

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| Mr Francis Darmanin | Chairman |
| Engineer Ramon Tabone | Member |
| Engineer Mark Sciberras | Member |

Department of Contracts

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| Mr Mario Borg | Assistant Director |
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After the Chairman's brief introduction, the appellant Company was invited to explain the motives of his objection.

Mr Stephen Calleja, Managing Director of E. Calleja & Sons Ltd, remarked that they had submitted the tender documentation along with a sample of the product that they were offering. He added that on the 21st October 2009 the Contracts Department informed them that their tender was found technically non-compliant because when the evaluation board tried to affix the lantern to a 42mm pipe it did not fit tight but remained loose and, as a consequence, the tender was being recommended for award to *Grechi Illuminazioni srl*.

Mr Calleja informed the PCAB that clause 3.2.2 stated that:

The lanterns will be affixed to poles having a specified outside diameter of 42.4mm and with tolerance limits ranging from 42.0mm to 42.9mm as required by MSA EN 10255-2004.

Mr Calleja claimed that once his firm had declared – indicated 'yes' at page 4 clause 3.2.2 – that the lantern they presented could be affixed to the pole indicated in the tender specifications, he expected the evaluation board to seek a clarification as to why they indicated that it would fit when, on testing, it did not fit properly. He explained that the lantern submitted with the tender was supplied with two sets of brackets, one to affix the lantern with a 60mm pole or less and the other to affix the lantern to a 42mm pole as requested in the tender. Mr Calleja informed the PCAB that he had in fact brought with him a sample affixed to a 42mm pole.

Mr Calleja remarked that in the tender submission they did not mention the brackets or inserted any note that brackets would be provided with the lantern for the purpose of affixing it to a 42mm pipe but they had indicated that the lantern could be affixed to a 42mm pole.

Mr Francis Darmanin, Chairman of the Evaluation Board, agreed with what Mr Calleja had just stated but he added that his board had to evaluate the appellant Company's submission on the documentation and sample submitted. He remarked that the sample presented by the appellants did not fit onto a 42mm pipe and that no brackets to fit it onto a 42mm pipe had been submitted with the sample.

Mr Calleja insisted that, on finding that the sample did not fit onto a 42mm pipe, the evaluation board should have sought an explanation from the tenderer as to why he had declared in his submission that it would fit a 42mm pipe.

Mr Darmanin reiterated that the sample submitted was not accompanied by any brackets and that the board had concluded that the sample represented the type of lantern that would be provided by Messrs E. Calleja & Sons Ltd. He added that the lantern submitted by the appellants was considered a good product except for that it did not fit onto a 42mm pole.

At this point Mr Darmanin informed the PCAB that the recommended tenderer provided a sample which fitted well onto a 42mm pole with no need for any alterations (price quoted was €54,640 – ranking 4th (financial evaluation) out of 15 -

and that the product submitted by the appellant was cheaper, namely, €41,300 - ranking 2nd (financial evaluation).

Mr Ramon Tabone, engineer and member of the Evaluation Board, remarked that, had the appellant Company indicated in its submission that the lantern would be supplied with a bracket to fit onto a 42mm pipe, then its product would have been considered in line with tender specifications like the one provided by the recommended tenderer. Mr Tabone confirmed that, when tested, the lantern provided by Grechi Illuminazioni srl did fit onto a 42mm pole as required.

When Mr Calleja pointed out that the current European standard for lanterns was 60mm, the Chairman PCAB drew his attention to the fact that the tender specifications stipulated a 42mm pole and that participating tenderers were expected to abide by that requirement.

Mr Calleja explained that he had sent the tender specification to his supplier and since the contracting authority requested a lantern to fit onto a 42mm pole, the supplier was prepared to provide a bracket for that purpose in addition to the bracket that fitted a 60mm pole as per European standards. Mr Calleja stated that he provided the sample from the stock he had.

Mr Carmel Esposito, PCAB member, drew the attention of Mr Calleja that, at page 21 of his Company's submission, the technical specifications clearly indicated that the lantern would fit onto a 60mm pole. Mr Calleja conceded that but he was quick to add that at page 4 of the same submission clause 3.2.2 his firm had indicated that the lantern would fit onto a 42mm pole.

The Chairman PCAB remarked that the contracting authority requested the sample to see whether it matched with the tender submission.

Mr Anthony Pavia, another PCAB member, expressed the view that the appellant Company should have inserted a note to the effect that the sample would be provided with a bracket to fit onto a 42mm pole.

Mr Calleja insisted that once the evaluation board found that the sample did not fit onto a 42mm pipe and, as a result, contrary to what the tenderer had indicated in writing at page 4 3.2.2., the evaluation board should have requested the bidder to clarify that discrepancy. He added that, if anything, the provision of an 'extra' bracket to allow the lantern to be affixed to a 42mm pole was an added cost to him.

The Chairman PCAB remarked that, albeit this appeared to be a genuine case, certain clarifications could easily lead to modifications to the original tender submission and that was unacceptable.

Dr Franco Vassallo, legal adviser of Grechi Illuminazioni srl, the recommended tenderer, remarked that (a) the sample was a mandatory requirement and that the sample provided by the appellant Company with its tender submission did not meet tender specifications and (b) he agreed with the PCAB that certain clarifications were dangerous and that modifications to the original tender submission were irregular.

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 ‘reasoned letter of objection’ dated 22.10.2009 and also through their verbal submissions presented during the public hearing held on the 16.12.2009, had objected to the decision taken by the General Contracts Committee;
- having taken note of the fact that the appellant claimed that once his firm had declared – indicated ‘yes’ at page 4 clause 3.2.2 – that the lantern it presented could be affixed to the pole indicated in the tender specifications, the same tenderer expected the evaluation board to seek a clarification as to why it had indicated that it (the lantern offered) would fit when, on testing, it did not fit properly;
- having also taken note of the fact that during the hearing the appellant Company representative remarked that in the tender submission they did not mention the brackets or inserted any note that brackets would be provided with the lantern for the purpose of affixing it to a 42mm pipe but they had indicated that the lantern could be affixed to a 42mm pole;
- having heard the Chairman of the Evaluation Board claim that (a) his Board had to evaluate submissions on the documentation and sample submitted with original offer, (b) the sample submitted by the appellants was not accompanied by any brackets and that the Board had concluded that the sample represented the type of lantern that would be provided and (c) the recommended tenderer provided a sample which fitted well onto a 42mm pole with no need for any alterations;
- having also heard Mr Tabone state that had the appellant Company indicated in its submission that the lantern would be supplied with a bracket to fit onto a 42mm pipe, then its product would have been considered in line with tender specifications like the one provided by the recommended tenderer;
- having taken full cognizance of Dr Vassallo’s comments;

reached the following conclusions, namely:

1. The PCAB feels that a contracting authority has every right to request a sample (or samples) to establish whether such sample(s) matched with the written claim made in a tenderer’s tender submission;
2. The PCAB also feels that the appellant Company should have, at least, inserted a note to the effect that the sample would be provided with a bracket to fit onto a 42mm pole;
3. The PCAB opines that Evaluation Boards are not obliged to clarify what ‘*prima faciae*’ seems to be the obvious and the onus as to whether an issue is

clear or not remains with the participating tenderer. In this particular instance the PCAB feels that apposite clarifications as regards specific related issues in the tender specifications would have turned out to be a futile exercise as details listed were clear enough and could have been easily understood by all participating tenderers.

As a consequence of (1) to (3) above this Board finds against the appellant Company.

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

Carmel J Esposito
Member

30 December 2009