

PUBLIC CONTRACTS APPEALS BOARD

Case No. 220

Adv. CT/N/012/2010; CT/2145/2010

Negotiated Tender for the Construction of a Green Roof at Animal After Care Centre, Tá Qali

The closing date for this call for offers was 10 June 2010.

Two (2) tenderer submitted their offers.

Derek Garden Centre Lt filed an objection on the 16 July 2010 against the decision by the Contracts Department to reject its offer because “16.1 (f) (iii): (Volume 4 – Bill of Quantities): Breakdown of the overall price not submitted” and to cancel the tender “since none of the submitted offers were fully compliant with the tender’s specifications and conditions”.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Monday, 16 August 2010 to discuss this objection.

Present for the hearing were:

Derek Garden Centre Ltd

Dr Peter Fenech	Legal Representative
Perit Frank Muscat	Project Manager
Mr Melosaul Balzan	Managing Director

Works Division (Design and Implementation Department)

Dr Franca Giordemaina	Legal Representative
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Adjudicating Board

Perit Ray Farrugia	Chairman
Mr Joseph Vella	Member

After the Chairman's brief introduction as to how the hearing was going to be conducted, the appellant Company was invited to explain the motive/s of the objection.

Dr Peter Fenech, legal representative of Derek Garden Centre Ltd, the appellants, explained that this appeal concerned

- (i) the disqualification of his client's offer because the Company did not submit the breakdown of the overall price in the form provided in Volume 4 (Bill of Quantities) as per clause 16.1 (f) (iii)

and

- (ii) the recommendation to cancel the tender

Dr Fenech submitted that:

- whilst there were several instances in the tender document that referred to the global contract price, yet, admittedly, there were other instances where the tender document requested the breakdown of the global price;
- no quantities were indicated in the bill of quantities under 'A - Preliminaries' (page 88 of the tender document), and, to a certain extent, one could understand why because when one considered the nature of the items involved, e.g. (1) 'Compliance with conditions of contract' or (6) 'Allow for the protection of works and site as required and as deemed necessary' one would immediately realise that the bidder could not quantify them and hence a lump sum was requested;
- with regard to part B of the bill of quantities (page 89 of the tender document), albeit quantities were specified against each of the nine items, yet, when his client carried out a survey, it emerged that, in actual fact, less quantities were required than those featured in the bill of quantities in the tender document. The resultant variations had been listed in his client's letter of objection dated 26th July 2010 where, for example, under item H1 'graded gravel' his client found out that only 10 cbm were actually required and not 140 cbm. Dr Fenech argued that, had his client taken into account the quantities indicated in the tender document, the said Company would have submitted an inflated global price. Yet, his client calculated the global sum on the outcome of the survey it conducted so as to quote a more realistic and a more competitive price.

Architect Frank Muscat, also representing Derek Garden Centre Ltd:

- explained that originally an (open) call for tenders was issued without the bill of quantities, which shortcoming was eventually rectified, and without the drawings, which were not forthcoming because, according to the Department of Contracts and the contracting authority, the drawings would only be given to the successful tenderer;

- also placed emphasis on the fact that, since none of the three bidders was found to be fully compliant - his firm having failed at administrative evaluation stage - the department resorted to the negotiated procedure,
- stated that in the negotiated procedure the document remained in place except for the introduction of (a) new conditions for lodging an appeal and (b) the environmental monitoring, which was a costly exercise;

Furthermore, Architect Muscat also argued that in this new procedure:

- bidders were given 15 days to submit their offers and his firm quoted a lump sum which catered for all the works requested in the tender;
- the quantities given in the bill of quantities in the tender document were misleading and that was the reason why his firm did not quote the rates in respect of each item; and
- had they been provided with the drawings in the first place he would have taken up with the department the issue of the variations between the quantities given in the tender document and the quantities that resulted following the survey carried out by his firm.

Dr Fenech defended the lump sum price quoted by his client as against the breakdown of the global sum or the rates in the light of the significant differences that emerged between the quantities given in the tender and those that resulted from their survey.

Dr Fenech argued that it was correct to quote a lump sum given the provisions of clause 17.1 (page 11 of the tender document) which read as follows:

“The tender price must cover the whole as described in the tender documents. Dr Fenech was however quick to admit that the subsequent clause 17.2 provided that: The tenderer must provide a breakdown of the overall price in Euro (€).”

Dr Fenech asked whether the issue, i.e. to quote a lump sum instead of giving the breakdown of the global amount, amounted to a clarification and not to a rectification. He added that since the global sum was given it could not be altered and, as a result, he contended that since the department did not see the necessity to request his client for a breakdown of the global sum already submitted the Company could only present a breakdown that added up to that global amount. That, opined Dr Fenech, should have certainly represented a clarification and not a rectification. Dr Fenech concluded that the contracting authority should have asked for a clarification and not resort to outright disqualification. He pointed out that, according to the amended regulations, tenderers were going to be allowed to provide certain documents or information within 48 hours of the closing date/time of the tender subject to the payment of a fine of €50.

Dr Franca Giordemaina, legal representative of the contracting authority, explained that:

- a lump sum for each item was requested with regard to the preliminaries because when one considered the nature of these items one would realise that they could not be quantified;
- instead of a lump sum, rates were requested with regard to the nine items quantified in section B of the bill of quantities and that these rates were required (i) to draw up and to issue payments in respect of the works carried out by the contractor, (ii), if the case arose, to deduct payment in case the contractor failed to perform the works as requested and (iii) to quantify extra works performed by the contractor, since most contracts ended up with an element of extra works;
- article 3 at page 57 provided that: *“The contract is made up of the following documents, in order of precedence... (f) the bill of quantities (after arithmetical corrections)/breakdown”*;
- clause 1.1 ‘Quantity of Items’ in the section titled ‘Unit-Price Contracts’ heading of Volume 4 at page 85 of the tender document read as follows:

“The quantities set forth against the items in the bill of quantities are an estimate of the quantity of each kind of the work likely to be carried out under the contract and are given to provide a common basis for bids. There is no guarantee to the Contractor that he will be required to carry out the quantities of work indicated under any one particular item in the bill of quantities or that the quantities will not differ in magnitude from those stated”;

- the quantities featured in the bill of quantities of the tender document were meant for the adjudicating board to compare bids on a like with like basis and not to allow each and every tenderer to quote prices relating to different quantities;
- the position paper dated 10 August 2010 submitted by the contracting authority to the Contracts Department listed six instances in the tender document where the request for the breakdown of the global price was mandatory;
- clause 1.3 at page 5 of the tender document stated that: *“This is a unit-price (Bill of Quantities) contract”* whereas the preamble on page 85 of the tender document provided that: *tenderers “must price each item in the bill of quantities separately and follow the instructions regarding the transfer of various totals in the summary”*; and
- albeit the appellant Company did provide the breakdown of the global amount in the open tender procedure, yet, it failed to provide the same in the negotiated procedure.

Architect Ray Farrugia, Chairman of the adjudicating board, explained that:

- in the course of the negotiated procedure the appellant Company had presented seven requests for clarifications and that they were all answered in time and, therefore, the same appellant Company could have even asked about the variations in the quantities;

- while admitting that the request for the drawings was turned down, he also pointed out that the request for the drawings was made during the first call for tenders and not during the negotiated tender process, insisting that these were two separate processes; and
- once the breakdown of the global amount was a mandatory requirement, the adjudicating board saw no need to seek a clarification in that regard.

Dr Fenech conceded that the tender document requested the breakdown of the global amount but he insisted that on page 21 clause 3 under the 'Tenderer's Declaration' the request was for the 'Total Price' and, he argued that, at the end of the day, it was the global price that was binding and that the global price could not be altered.

The Chairman PCAB remarked that the fill-in spaces in the schedules in tender documents are provided for a specific purpose and that it was not up to the tenderer to ignore filling up the spaces provided, e.g. the spaces at page 89 of the tender document were clearly provided to fill in the rates, all the more in the absence of satisfactory explanations.

Mr Edwin Muscat, a PCAB member, remarked that the intention of the contracting authority behind the provision of an estimate of the quantities involved was for all tenderers to quote for the same quantities and thus the adjudicating board would be in a position to compare bids like with like.

Dr Fenech argued that it was in the interest of his client to quote a competitive price and to do that the bidder had to base its calculations on the realistic quantities that emerged from the survey carried out by his client and not on the inflated quantities given in the tender document.

On his part, Architect Farrugia stated that payments to contractor were calculated by applying the contract rates to the amount of work carried out. He claimed that none of the tenderers had questioned the department's request for rates in the tender document and that it was not unheard of to rectify mistakes detected in the tender documents by way of addenda communicated to all tenderers. Architect Farrugia emphasised that, in this case, the letter of acceptance would have been issued on the basis of the rates in the bill of quantities and not on a lump sum basis. The Chairman of the adjudicating board stressed that this was one of the fundamentals in the issue of works contracts so much so that such tender documents even allowed for a variation of up to 20% over and above the contract value, something which one would not be able to do if one were to stick to the lump sum.

Architect Muscat explained that, in this case, tenderers had to submit the tender documentation within 15 days, which included 5 days to submit clarifications together with the site visit. He conceded that during the open tender procedure his firm had quoted rates on the basis of the quantities provided in the tender document, which were the same quantities that featured in the negotiated procedure, and that it was following the results of their survey that they opted to quote a lump sum with a view to enhance their price competitiveness. Architect Muscat claimed that, notwithstanding the discrepancies that emerged from the survey carried by his firm, the lump sum quoted in the latter's tender submission covered the quantities indicated

in the tender document. He reiterated that, had the contracting authority made the drawings available, he would have checked the results of his survey against those drawings and if his findings were confirmed then he would have taken up the issue of quantity variations with the contracting authority.

The Chairman PCAB observed that the appellant Company's tender submission, both with and without the root barrier, was based on the quantities provided in the tender document.

Dr Giordemaina insisted that the quantities given in the tender document were meant to provide a level playing among tenderers and that the contracting authority could not arrive at the applicable rates from the lump sum quoted by the appellant Company.

The Chairman PCAB observed that it would appear that the appellant Company had worked out the global amount according to quantities that emerged from the survey it carried out and then it applied that same global amount to the quantities given in the tender's bill of quantities, even if the quantities differed.

Architect Muscat remarked that the other two tenderers were technically non compliant whereas the appellant Company submitted a compliant bid except for the breakdown of the global amount. He further declared that the global amount quoted in the appellants' tender submission represented the amount that it would charge in order to execute the entire contract.

Mr Muscat, the PCAB member, remarked that, at the end of the day, the contracting authority had to measure and quantify the work carried by the contractor and to apply the contract rates in order to issue the relative payment(s) - something that the contractor could not arrive at if the bidder only quoted a global sum without indicating the relative rates.

Dr Fenech reiterated his stance, namely that the issue should have been settled through a clarification on the part of the contracting authority, which clarification was permissible by regulations. He claimed that his client's bid should not have been excluded.

Architect Farrugia explained that the adjudicating board did not consider that the point at issue warranted a clarification and he even remarked that it was the desire and the intention of the department to award tenders so as to get things done rather than to have tenders cancelled or to have tenders that got stalled in the process.

Dr Giordemaina referred to note 3 of clause 11 (f) (page 22) where it was stated that no "*rectification shall be allowed. Only clarifications on the submitted information may be requested.*"

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 26 July 2010 and also through their verbal submissions presented during the public hearing held on 16 August 2010 had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellant Company’s representatives submissions, particularly those relating to (a) instances where document required the breakdown of the global price and other instances where it did not, (b) the fact that no quantities were indicated in the bill of quantities, (c) the fact that, according to the appellants, when the said appellant Company carried out a survey, it emerged that, in actual fact, less quantities were required than those featured in the bill of quantities in the tender document, (d) the fact that had the appellant Company taken into account the quantities indicated in the tender document, the said Company would have submitted an inflated global price, (e) the fact that the call for tenders was issued without the drawings as these were only going to be given to the successful tenderer, (f) the fact that in the negotiated procedure only 15 days were given to tenderers to submit their offers (g) the fact that the appellant Company only quoted a lump sum which catered for all the works requested in the tender in line with the provisions of clause 17.1 (page 11 of the tender document), (h) the fact that quoting a lump sum instead of giving the breakdown of the global amount, should not only have given rise to a clarification instead of a rectification but also that the contracting authority should have asked for a clarification and not resort to outright disqualification, (i) the contention that it was in the interest of the appellants to quote a competitive price and to do that the bidder had to base its calculations on the realistic quantities that emerged from the survey carried out by the same appellant Company and not on the inflated quantities given in the tender document, (j) the admission made by Architect Muscat who conceded that, during the open tender procedure, his firm had quoted rates on the basis of the quantities provided in the tender document, which were the same quantities that featured in the negotiated procedure, and that it was following the results of their survey that they opted to quote a lump sum with a view to enhance their price competitiveness and (k) the fact that the appellants claimed that, notwithstanding the discrepancies that emerged from the survey carried by the same appellant Company, the lump sum quoted in its tender submission covered the quantities indicated in the tender document;
- having also taken note of the contracting authority’s legal and other representatives who, *inter alia*, (a) claimed that a lump sum for each item was requested with regard to the preliminaries because when one considered the nature of these items one would realise that they could not be quantified, (b) stated that rates were required to enable the contracting authority to issue payments in respect of the works carried out by the contractor and, if the case arose, to deduct payment in case the contractor failed to perform the works as requested, as well as, quantifying extra works performed by the contractor, (c) argued that clause 1.1 ‘Quantity of Items’ in the section titled ‘Unit-Price Contracts’ heading of Volume 4 at page 85 of the tender document clearly stated that “*The quantities set forth against the items in the bill of quantities are an estimate of the quantity of each kind of the work likely to be carried out under the contract and are given to provide a common basis for bids*”, (d) stated that the quantities featured in the bill of quantities of the tender document were meant for the adjudicating board to

compare bids on a like with like basis and not to allow each and every tenderer to quote prices relating to different quantities, (e) stated that, albeit the appellant Company did provide the breakdown of the global amount in the open tender procedure, yet, it failed to provide the same in the negotiated procedure, (f) claimed that, in the course of the negotiated procedure, the appellant Company had presented seven requests for clarifications and that they were all answered in time and, therefore, the same appellant Company could have even asked about the variations in the quantities, (g) stated that once the breakdown of the global amount was a mandatory requirement, the adjudicating board saw no need to seek a clarification in that regard, (h) stated that payments to the contractor were calculated by applying the contract rates to the amount of work carried out and (i) stated that, in this case, the letter of acceptance would have been issued on the basis of the rates in the bill of quantities and not on a lump sum basis;

reached the following conclusions, namely:

1. The PCAB opines that the fill-in spaces in the schedules in tender documents are provided for a specific purpose and that it was not up to the tenderer to ignore filling up the spaces provided, e.g. the spaces at page 89 of the tender document were clearly provided to fill in the rates, all the more in the absence of satisfactory explanations.
2. The PCAB accepts the fact that the intention of the contracting authority behind the provision of an estimate of the quantities involved was for all tenderers to quote for the same quantities thus enabling the adjudicating board to be in a position to compare bids like with like.
3. The PCAB has no doubt whatsoever that, at the end of the day, the contracting authority had to measure and quantify the work carried by the contractor and to apply the contract rates in order to issue the relative payment(s) - something that the contractor could not arrive at if the bidder only quoted a global sum without indicating the relative rates.
4. The PCAB cannot accept the appellant Company's total disregard to the contracting authority's quantities as mentioned in the tender document opting to quote a lump sum with a view to enhance its price competitiveness ignoring a basic principle in public procurement, namely that of placing all bidders on a level playing field.

As a consequence of (1) to (4) 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 said appellants should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

18 August 2010