

PUBLIC CONTRACTS REVIEW BOARD

Case No. 240

WSM 167/2010

Works Tender for the Finishing Works at the Second Floor Level at SAWTP Administration Building, M'Scala.

This call for tenders was published in the Government Gazette on 16 July 2010. The closing date for this call for offers was 6 August 2010.

The estimated value of this tender was Euro 94,004.37 (inclusive of VAT).

Six (6) tenderers submitted their offers.

Vella Falzon Building Supplies Ltd filed an objection on 13 August 2010 against the decision taken by the Contracts Department to disqualify its offer as administratively non-compliant.

In terms of PART II – Rules governing public contracts whose value does not exceed €120,000 of LN 296 of 2010 the Public Contracts Review 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, 8 November 2010 to discuss this objection.

Present for the hearing were:

Vella Falzon Building Supplies Ltd

Dr Nicolai Vella Falzon	Legal Representative
Mr Alexis Vella Falzon	Representative

Schembri Barbros Ltd

Dr John Bonello	Legal Representative
Mr Anton Schembri	Representative

WasteServ Malta Ltd

Dr Victor Scerri	Legal Representative
Mr Aurelio Attard	Representative

Evaluation Committee:

Perit Ivan F. Bartolo	Chairman
Ing. Joseph Bezzina	Secretary
Perit Robert Grech	Member
Perit Giorgio Schembri	Member

After the Chairman's brief introduction the appellant company was invited to explain the motives of the objection.

Dr Nicolai Vella Falzon, legal representative of Vella Falzon Building Services Ltd, the appellant company, explained that his clients had been informed that their offer was rejected as it was considered to be administratively non-compliant for the three reasons mentioned hereunder, which, in the same lawyer's personal opinion, concerned facts rather than arguments:

Reason No. 1

The technical literature for the plasterboard partitions was not submitted

Dr Vella Falzon maintained that his client had in fact submitted this literature.

Mr Aurelio Attard, representing WasteServ Malta Ltd, the contracting authority, intervened to confirm that the said literature was furnished and that the adjudicating board must have overlooked it.

It was thus agreed by all those present that this objection will be dropped due to contracting authority's own admission of error committed.

Reason No. 2

Section M 20 'Plastering/rendered/roughcast coating' 1.05 'extra over above for curved work'

Dr Vella Falzon stated that the contracting authority was claiming that the respective three columns relating to 'Rate (excluding VAT)', 'Amount (excluding VAT) and 'VAT' were missing. The appellant company's legal advisor disagreed with the authority's claim in view of the fact that, according to him, his client had inserted three 'dashes', which meant that his client was not going to charge for that work/service (i) because the amount of work involved was insignificant and (ii) because it was, more or less, included in the previous item 1.04 which involved plastering works. He added that this was confirmed by the fact that the total added up with the three columns against 1.05 taken as zero (dash).

At this point Dr Vella Falzon referred to a previous tender (Ref: FTS/33/10) wherein his client filled in the same details and the said company's offer had not only been adjudicated to be compliant but ended up being awarded the tender. Dr Vella Falzon agreed that his client could have been more clear in this respect but insisted that the three 'dashes' were equivalent to a zero and that was in fact reflected in the total of the schedule.

On his part, Mr Attard contended that the instructions with regard to the 'Schedule of Rates/Prices' were quite clear and he quoted from clause 1.2.2, namely:

“... Failure to fill in this form, or a form with incomplete information, or a form containing ambiguous financial information (e.g. prices, total etc) shall disqualify the tender submission.”

Mr Attard retained that the contracting authority could not interpret the three ‘dashes’ inserted by the appellant company against item 1.05 and, as a consequence, that amounted to ambiguous information and, given that this concerned the price of the bid, the contracting authority was precluded from seeking clarifications and so, according to directives received from the Department of Contracts, the only option it had was to reject the offer.

Dr Victor Scerri, legal representative of the contracting authority, remarked that, elsewhere in its submission, the appellant company had inserted such notes as ‘included in above rate’.

The Chairman PCRB agreed that no clarification which could alter the price quoted by the tenderer was permissible but he held the view that, in this case, had the tenderer been asked to confirm if the ‘dash’ represented a ‘zero’, this would not have had a bearing on the price because the total would have remained unaltered and there would have been no negotiated element introduced in the adjudication process.

Reason No. 3

Schedule of rates had been left completely empty

Dr Vella Falzon remarked that this tender was issued for finishing works, namely plastering and painting on already constructed structures, whereas the ‘schedule of rates’ related to construction works, i.e. concrete, admixtures to concrete, masonry and so forth, and not to finishing works. He added that his client had, in fact, contacted the contracting authority by phone and, in the circumstance, he was informed by Mr Aurelio Attard that one did not have to fill in the schedule of rates.

The appellant company’s legal advisor stated that his client had participated in a similar tender (ref: 119/2010 – published on the 27 April 2010 and awarded on the 2 June 2010) in which case he did not fill in the ‘schedule of rates’ but inserted the note ‘Does not apply’. Dr Vella Falzon stressed that the ‘schedule of rates’ had no bearing on the total price offered by the bidder pointing out that the tender had to be awarded on the total price offered.

Mr Attard intervened and, whilst admitting that in the case of tender ref. 119/2010 Mr Alexis Vella Falzon, the appellant company’s representative, had sought a verbal clarification and that he had advised Mr Vella Falzon that one did not have to fill in the ‘schedule of rates’. However, proceeded Mr Attard, he categorically denies having been contacted by any of the appellant’s representatives with regard to the call for tenders which was the subject of this hearing. Mr Attard conceded that, in hindsight, the advice he gave the appellant company with regard to tender ref. 119/2010 was an erroneous one, both in substance, as well as, the normal public contracting regulations permitted as, under normal circumstances, the latter envisaged that any similar contact had to be carried out in writing and all correspondence had to

be circulated amongst all bidders via the Department of Contracts. Mr Attard stated that, nevertheless, what applied to one tender did not, necessarily, apply to another tender and, furthermore, he could not vouch for what happened in the case of tender ref. FTS/33/10 referred to earlier by Dr Vella Falzon since it was not issued by his organisation.

Mr Attard remarked that albeit the 'schedule of rates' was part of the tender document which had to be filled in, yet, it appeared that the appellant company had decided not to fill it in without even seeking a clarification thereon. The contracting authority's same representative acknowledged that, although the 'schedule of rates' did not influence the price quoted by the bidder, these rates were required in case the need for additional works arose, in which case the contracting authority would have the applicable rates in hand.

At this stage the PCRB verified that the recommended tenderer had, in fact, filled in the 'schedule of rates' in its original tender submission.

The Chairman PCRB said that he saw the purpose why the contracting authority requested the information in the 'schedule of rates' and, despite the fact that he shared the appellant company's view, namely that these 'rates' did not, as such, have a bearing on the total price offered, the contracting authority had to adjudicate the tender submission as a whole and that included the filling in of the 'schedule of rates'.

Dr John Bonello, legal advisor of the recommended tenderer, drew the attention of the PCRB to clause 2.8 of the tender document which dealt with 'Tender Rates/Prices'.

In conclusion, Mr Vella Falzon stated that he felt that his company had been misguided by the information it had obtained from the contracting authority on an identical tender which had been issued by the same contracting authority a few months before.

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 13 August 2010 and also through their verbal submissions presented during the public hearing held on 8 November 2010 had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellant's representatives' remarks in respect of the fact that (a) these disagreed with the contracting authority's claim that the respective three columns - as submitted by the appellant company - relating to 'Rate' (excluding VAT)', 'Amount' (excluding VAT) and 'VAT' were missing, (b) they claimed that, in view of the fact that they had inserted three 'dashes' – which the appellant company claimed that these were equivalent to a zero – this automatically implied that they were not going to charge for that work/service, (c) they were not charging for such work/service referred to in (b) because, apart from the fact that the amount of work involved was insignificant, it was, more or less, included in the previous item 1.04 which

involved plastering works, (d) they claimed that this tender was issued for finishing works, namely plastering and painting on already constructed structures, whereas the 'schedule of rates' related to construction works, i.e. concrete, admixtures to concrete, masonry and so forth, and not to finishing works, (e) they remarked that the 'schedule of rates' had no bearing on the total price offered by the bidder and (f) they claimed that the company had been misguided by the information it had obtained from the contracting authority on an identical tender which had been issued by the same contracting authority a few months before;

- having also taken note of the contracting authority's representatives' (a) claim that the instructions with regard to the 'Schedule of Rates/Prices' were quite clear as reflected in clause 1.2, (b) claim that the contracting authority could not interpret the three 'dashes' inserted by the appellant company against item 1.05 and, as a consequence, that amounted to ambiguous information and, given that this concerned the price of the bid, the contracting authority was precluded from seeking clarifications and so, according to directives received from the Department of Contracts, the only option it had was to reject the offer, (c) denial that Mr Attard had been contacted by any of the appellant's representatives with regard to the call for tenders which was the subject of this hearing, (d) remark that, albeit the 'schedule of rates' was part of the tender document which had to be filled in, yet, it appeared that the appellant company had decided not to fill it in without even seeking a clarification thereon and (e) claim that, although the 'schedule of rates' did not influence the price quoted by the bidder, these rates were required in case the need for additional works arose;
- having taken cognizance of the fact that, with regards to the objection submitted in relation to the fact that whilst, originally, the contracting authority had argued that the appellant company had not submitted the pertinent technical literature for the plasterboard partitions, yet, during the hearing it was agreed by all those present that this objection will be dropped due to contracting authority's own admission of error committed in, originally, reaching such conclusion, namely the non-submission of the relevant literature by Vella Falzon Building Supplies Ltd,

reached the following conclusions, namely:

1. The PCAB feels that no clarification which may alter the price quoted by the tenderer is permissible. However, in this particular instance, had the tenderer been asked to confirm if the 'dash' represented a 'zero', this would not have had a bearing on the price because the total would have remained unaltered and there would have been no negotiated element introduced in the adjudication process.
2. The PCAB opines that, although, as was the case in this particular call, the 'schedule of rates' do not influence the price quoted by the bidders, yet, these rates are required in case the need for additional works arises, in which case the contracting authority would already have the applicable rates in hand.

3. Furthermore, this Board argues that the contracting authority has to adjudicate a tender submission as a whole and that includes any 'schedule of rates' duly filled.
4. This Board cannot tolerate an instance wherein a participating tenderer decides, arbitrarily, what to insert or not in a tender document duly submitted to a contracting authority.

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

In view of the above and in terms of the Public Contracts Regulations, LN 296 of 2010, 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

12 November 2010