

PUBLIC CONTRACTS APPEALS BOARD

Case No. 267

CT/2149/2010 - Adv. No. CT/131/2010

Tender for the Supply, Installation and Commissioning of two Photovoltaic Systems at the New Boys Secondary School at Ta' Zokrija, Mosta and Victoria Gozo

This tender was published on the 28th May 2010. The closing date for this call for offers was 20th July 1020.

The estimated value of this tender was €219,385 (inclusive of VAT).

Five (5) tenderers submitted nine (9) offers.

Messrs Electrofix Energy Ltd filed an objection on the 14th December 2010 against the decisions by the Contracts Department to disqualify its offer on being found administratively non-compliant and to recommend tender award to Alberta Fire Fighting & Security Ltd for the price of €130,343, inclusive of VAT

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, 21st March 2011 to discuss this objection.

Present for the hearing were:

Electrofix Energy Ltd

Dr Adrian Delia	Legal Representative
Mr Matthew Paris	Representative
Mr Joseph Schembri	Representative
Ms Deborah Schembri	Representative

Alberta Fire Fighting & Security Ltd (Alberta Ltd)

Mr Simon Bugeja	Representative
Ms Geraldine Baldacchino	Representative

Foundation for Tomorrow's Schools (FTS) (Ministry of Education, Employment and the Family)

Evaluation Board

Mr Charles Farruga	Chairman
Mr Chris Pullicino	Member
Mr Andrew Ellul	Member
Mr Leonard Zammit	Member
Mr Ivan Zammit	Secretary

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

Dr Adrian Delia, legal representative of Electrofix Energy Ltd, the appellants, explained that his client's objection covered two aspects, namely, (a) the exclusion of its offer from the tendering process and (b) that the recommended tender was not compliant with tender specifications.

A) Exclusion for the Non-submission of Audited Accounts

Dr Delia stated that...

(i) by way of email dated 16th September 2010, the Contracts Department informed his client that the "*General Contracts Committee has been notified by the Evaluation Committee that the following administrative shortcoming had been noted with regard to your submission*", namely ... "*Audited Financial Statements for the last three years not submitted in the name of Electrofix Energy Ltd*" and that his client was being given the opportunity to rectify that shortcoming in terms of Article 1.1 of the Instructions to Tenderers.

(ii) by way of email dated 17th September 2010, his client reiterated the following facts to the attention of the contracting authority:

- a. that Electrofix Energy Ltd was registered on the 4th March 2009 and that therefore it could not submit the three years audited financial statements as requested;
- b. that in terms of law, the tenderer had submitted three years audited statements of Electro Fix Ltd together with the declaration of undertaking from that company as evidence of the tenderer's financial standing; and
- c. that, for all intents and purposes, the tenderer was going to submit the company's audited financial statements for the last financial year, i.e. the only one available from its inception in terms of Article 1.1 of the 'Instructions to Tenderers' together with a copy of the receipt of the administrative penalty.

(iii) the same Public Contracts Regulations provided as follows, viz:

50. (1) Proof of economic operator's economic and financial standing may, as a general rule, be furnished inter alia, by one or more of the following:

(c) a statement of the economic operator's overall turnover and, where appropriate, its turnover in respect of the products, works or services to which the contract relates for the three previous financial years depending on the date on which the economic operator was set up or the economic operator started trading, as far as the information on these turnovers is available.

(2) An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It

must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.

- (iv) notwithstanding his client's reply, by way of rectification, on the 1st of December 2010 the Department of Contracts informed his client that his tender was not successful as it was administratively non-compliant quoting the following reason ... "*Financial and Economic Standing - Failed to submit audited accounts of the bidding company as requested.*"; and
- (v) his client's offer was in fact administratively compliant because, although the tenderer was Electro Fix Energy Limited, the said tenderer was going to be supported technically and financially throughout the execution of the tender by Electro Fix Ltd, which was a company in the same group of companies and which had produced an undertaking to that effect.

At this point Mr Charles Farrugia, Chairman of the Evaluation Board, intervened and made reference to the following:

- i. in its first evaluation report dated 28th October 2010, Electrofix Energy Ltd (Option A) at €149, 624.84 was considered administratively and technically compliant but the award of the tender was recommended to Alberta Ltd (Option 2) which was also compliant but cheaper at €130,343;
- ii. at a meeting held on the 9th November 2010, the General Contracts Committee requested the Evaluation Board to review its report as it was noted that Electrofix Energy Ltd was not administratively compliant since it had failed to present its audited accounts for the previous three years; and
- iii. in the evaluation report dated 18th November 2010 Options A and B submitted by Electrofix Energy Ltd, the appellant company, were disqualified as these were considered to be administratively non-compliant

B) Technical Non-compliance of the Recommended Tenderer

Dr Delia submitted that from research carried out by his client, evidence emerged that the PV panels manufactured by Pramac Luce MCPH, which were offered by the recommended tenderer, were not technically compliant with the following specifications indicated in the tender document at pages 70 and 71, i.e.:

3.04.1 The PV panels shall be capable of converting at a minimum of 12% efficiency at 25°C/1000W/M2 Glass cover shall be tempered type and shall be all weather proof including hail resistance which shall be specified by the manufacturer, and

3.04.8 The PV panels shall be guaranteed to have an operational life of at least twenty five years.

The appellant company produced:

- i. the manufacturer's certificate relative to Pramac Luce MCPH which indicated that (a) the product did not have a minimum of 12% efficiency at 25°C/1000W/M2 but that the four models produced by Pramac – 95W, 105W, 115W and 125W - had a module efficiency percentage that ranged from 6.64% to 8.74% and (b) the product was not guaranteed for a minimum operational life of 25 years but had a long lifetime of 20 years;
- ii. a list of companies which had the certificate with regard to the salt mist test of PV Modules by TUV Rheinland, which document was downloaded from the Internet and which included the brands Conergy, offered by the appellants, and Pramac, offered by the recommended tenderer; *and*
- iii. the data sheet with regard to the Conergy PowerPlus product, offered by the appellant company, which indicated that the efficiency of the module was of 13.51% and that it was offering a warranty of 25 years

Once again, the Chairman of the Evaluation Board, intervened and made the following remarks, namely that:

- i. according to Ing. Albert Ellul, the technical adviser to the evaluation board, Option 2 submitted by Alberta Ltd (Alberta Ltd submitted four options but only one was adjudicated as compliant) had met all the requirements requested in the tender document and that the offer, having also been the cheaper, was, consequently, recommended for award in both evaluation reports, i.e. those dated 28th October and 18th November 2010;
- ii. at pages 3 and 4 of the technical memorandum dated 28th October 2010 submitted by Ing. Albert Ellul and attached to the evaluation report dated 28th October 2010, it was indicated that Option 2 submitted by Alberta Ltd, the recommended offer, exceeded the guarantee stipulated at clauses 3.04.5 and 3.04.6. Dr Delia, however, pointed out that he had referred to infringements with regard to clauses 3.04.1 and 3.04.8; and
- iii. Ing. Albert Ellul, adviser to the adjudicating board and the person in charge of the drawing up of the tender document, could not attend the hearing as he had to assist with the hospitalisation of a relative and that he, Mr Farrugia, would rather have Ing. Ellul comment on the technical aspects of the tender.

Ms Geraldine Baldacchino, representing Alberta Ltd, remarked that albeit both she and her colleague, Mr Simon Bugeja, who was also present at the hearing, were not technically competent to react to the claims that were being made by the appellant company, yet, she stood by the declarations and decisions expressed by the evaluation board in its reports.

At the request of the Chairman Public Contracts Appeals Board, Dr Delia made the following statement:

The appellant was questioning whether the recommended tenderer was compliant with regard to the following two technical requirements laid down in the tender document, i.e:

3.04.1 The PV panels shall be capable of converting at a minimum of 12% efficiency at 25°C/1000W/M2 Glass cover shall be tempered type and shall be all weather proof including hail resistance which shall be specified by the manufacturer, and

3.04.8 The PV panels shall be guaranteed to have an operational life of at least twenty five years.

At the hearing, the appellant presented a certificate issued by Pramac Luce MCPH, the manufacturer of the recommended product, where it declared that the maximum lifetime of the product was 20 years, instead of the 25 years requested in the tender, and that with regard to module efficiency instead of being capable of converting to a minimum of 12% efficiency, it was capable of converting up to 8.74%.

At this point the Public Contracts Appeals Board concluded by stating that it was being asked to decide on (i) whether the appellant's offer was, in fact, administratively compliant and, if in the affirmative, to reinstate it in the tendering process and (ii) whether the recommended offer was compliant with tender conditions and specifications in the light of the documentation/certificates presented by the appellant at the hearing.

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 14th December 2010 and also through their verbal submissions presented during the public hearing held on 21st March 2011 had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellants' representatives' (a) reference to the fact that Electrofix Energy Ltd was registered on the 4th March 2009 and that therefore it could not submit the three years audited financial statements as requested as requested by the contracting authority, (b) reference to the fact that the tenderer had submitted three years audited statements of Electro Fix Ltd together with the declaration of undertaking from that company as evidence of the tenderer's financial standing, (c) claim that , for all intents and purposes, the tenderer was going to submit the company's audited financial statements for the last financial year, i.e. the only one available from its inception in terms of Article 1.1 of the 'Instructions to Tenderers', (d) reference to clause 50 of the Public Contracts Regulations, especially 50 (2) wherein it is specifically stated that an "*economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.*", (e) claim that its bid was, in fact, administratively compliant because, although the tenderer was Electro Fix Energy Limited, the said

tenderer was going to be supported technically and financially throughout the execution of the tender by Electro Fix Ltd, which was a company in the same group of companies and which had produced an undertaking to that effect, (f) reference to the fact that from research carried out by the appellant company, evidence emerged that the PV panels manufactured by Pramac Luce MCPH, which were offered by the recommended tenderer, were not technically compliant, (g) presentation of the manufacturer's certificate relative to Pramac Luce MCPH which indicated that (1) the product did not have a minimum of 12% efficiency at 25°C/1000W/M2 but that the four models produced by Pramac – 95W, 105W, 115W and 125W - had a module efficiency percentage that ranged from 6.64% to 8.74% and (2) the product was not guaranteed for a minimum operational life of 25 years but had a long lifetime of 20 years, (h) presentation of a list of companies which had the certificate with regard to the salt mist test of PV Modules by TUV Rheinland, which document was downloaded from the Internet and which included the brands Conergy, offered by the appellants, and Pramac, offered by the recommended tenderer, (i) presentation of the data sheet with regard to the Conergy PowerPlus product, offered by the appellant company, which indicated that the efficiency of the module was of 13.51% and that it was offering a warranty of 25 years and (j) claim that at the hearing, the appellant presented a certificate issued by Pramac Luce MCPH, the manufacturer of the recommended product, where it declared that the maximum lifetime of the product was 20 years, instead of the 25 years requested in the tender, and that with regard to module efficiency instead of being capable of converting to a minimum of 12% efficiency, it was capable of converting up to 8.74%;

- having heard the contracting authority's representatives' (a) argue that in its first evaluation report dated 28th October 2010, Electrofix Energy Ltd (Option A) at €149,624.84 was considered administratively and technically compliant but the award of the tender was recommended to Alberta Ltd (Option 2) which was also compliant but cheaper at €130,343, (b) state that at a meeting held on the 9th November 2010, the General Contracts Committee requested the Evaluation Board to review its report as it was noted that Electrofix Energy Ltd was not administratively compliant since it had failed to present its audited accounts for the previous three years, (c) state that in the evaluation report dated 18th November 2010 Options A and B submitted by Electrofix Energy Ltd, the appellant company, were disqualified as these were considered to be administratively non-compliant, (d) state that, according to Ing. Albert Ellul, the technical adviser to the evaluation board, Option 2 submitted by Alberta Ltd (Alberta Ltd submitted four options but only one was adjudicated as compliant) had met all the requirements requested in the tender document and that the offer, having also been the cheaper, was, consequently, recommended for award in both evaluation reports, i.e. those dated 28th October and 18th November 2010 and (e) state that at pages 3 and 4 of the technical memorandum dated 28th October 2010 submitted by Ing. Albert Ellul and attached to the evaluation report dated 28th October 2010, it was indicated that Option 2 submitted by Alberta Ltd, the recommended offer, exceeded the guarantee stipulated at clauses 3.04.5 and 3.04.6,

reached the following conclusions, namely:

1. The Public Contracts Appeals Board opines that, whilst acknowledging the parameters referred to in the tender document, yet it also notes that contracting authorities have to be realistic and pragmatic, especially when they are covered by the provisions of the pertinent regulations such as clause 50 of the Public Contracts Regulations, especially 50 (2).
2. Considering that:
 - a. the evaluation board – regardless of the bid submitted by the tendering appellant company – had found the offer as submitted by Alberta Ltd (Option 2) as not only compliant but also the cheapest

and

- b. the appellant company's representatives have brought to the attention of those present at the hearing that, from research carried out by the appellant company, evidence emerged that the PV panels manufactured by Pramac Luce MCPH, which were offered by the recommended tenderer, were not technically compliant due to a smaller efficiency percentage as well as lower guaranteed shelf life than the requested minimum,

the Public Contracts Appeals Board concludes that, prior to recommending the award of this tender, the evaluation board should examine the claim made by the appellant company in 2 (b) above.

As a consequence of (1) to (2) above this Board finds in favour of the appellant company.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the bid submitted by the appellant company should be reinstated in the evaluation process and that the deposit submitted by the said appellants should be thus reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

7 April 2011