

PUBLIC CONTRACTS REVIEW BOARD

Case No. 272

MXLC 01/11

Tender for the Design, Supply, Installation, Commissioning and Maintenance of a Ground Fountain at Church Square (Pjazza Madonna ta' Pompei) Marsaxlokk

This call for tenders was published in the Government Gazette on 8th March 2011. The closing date for this call with an estimated budget of € 69995 was 15th March 2011.

Two (2) tenderers submitted their offers.

4H20 Ltd filed an objection on 30th March 2011 against the decision taken by the Marsaxlokk Local Council to disqualify its offer on being found technically non-compliant and to recommend tender award to Attard Farm Supplies Ltd for the price of €58,514.58.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Edwin Muscat and Mr. Carmel Esposito as members convened a public hearing on Friday, 8th April 2011 to discuss this objection.

Present for the hearing were:

4H20 Ltd

Mr Etienne Bonello DuPuis
Dr Karl Grech

Director
Legal Representative

Attard Farm Supplies Ltd (AFS)

Mr Joseph Attard
Mr George Mangion

Representative
Representative

Marsaxlokk Local Council

Mr John Restall
Ing. Brian Cauchi

Executive Secretary
Ministry for Resources and Rural Affairs engineer
- Technical Adviser to M'Xlokk Local Council

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

Mr Etienne Bonello DuPuis, representing 4H20 Ltd, the appellant company, remarked that on the 24th March 2011 the Marsaxlokk Local Council had informed him that:

- his company had submitted an administratively compliant tender
- there was an error in the total price of the Bill of Quantities which added up to €65,790.90 instead of €52,285.80 *which issue Mr Bonello Dupuis had clarified after the closing date of the tender by way of an email in the sense that he claimed that the difference represented the discount that the company was offering*
- certain technical documentation was missing

Mr Bonello DuPuis claimed that, in these circumstances, and given that his company's offer was cheaper than the recommended offer, 4H20 Ltd should have been awarded the tender.

Mr John Restall, Executive Secretary of M'Xlokk Local Council, remarked that, at the end of the day, the total price that the M'Xlokk Local Council took into account was €65,790.90 and not €52,285.80. At this point he referred to a letter dated 24th March 2011, which he sent to the appellant company, which read as follows:

“The grand total of your tender on page 21 should read €65,790.90 and not €52,285.80. When you were informed of this discrepancy you immediately informed us by e-mail that you had inadvertently omitted the discount line as an item in the tender document due to the last minute rush to deposit the tender and that the total shown in the tender document (€52,285.80) is valid.”

Mr Restall declared that no discount was indicated by the appellant company in its original tender submission and that the appellant first mentioned the discount on being informed that, during adjudication, a discrepancy emerged between the sum of the sub-totals and the total in the Bill of Quantities.

The Public Contracts Review Board observed that the passage from the letter of the 24th March 2011 quoted above simply recounted the explanation given by the appellant company with regard to the discrepancy in the price total but it did not mean that the local council had accepted that explanation as valid.

Mr Brian Cauchi, an engineer employed at the Ministry for Resources and Rural Affairs and who, in this tender had acted as a technical adviser to the M'Xlokk Local Council, testified under oath that:

- a) although the appellant company was informed that its bid was administratively compliant, according to his report, the appellant company's bid was deficient in the sense that the *Bill of Quantities* did not include the rates but featured only the totals

thereof whereas Annex 2 ‘Schedule of Rates – Bill of Quantities’ indicated that the” *form must be filled in and submitted with the tender document.*” He added that that included, among other things, the rates in the *Bill of Quantities*.

b) the bid was technically non-compliant because no literature was submitted with regard to the following items, namely:

- Section 6 - Pre Filter of Filter Basket
- Section 8 - Valves
- Section 9 - Control Panel
- Section 10 - Pipes and fittings
- Section 11 - Water Treatment Equipment

c) Clause 2 of Annex 1 stated that

“Each offer shall include:

2.1 Description of the equipment and its components as offered together with all relevant manufacturers’ catalogues, illustrations and diagrams..... Literature shall be provided for the following”

d) the total of the *Bill of Quantities* did not match the sub-totals indicated by the tenderer – individual rates were not quoted by the appellant company – which discrepancy was pointed out without enquiring into the reason behind it since, at that stage, the tendering company’s representative had to evaluate on the basis of the documentation made available to him

e) the rates/prices in the *Bill of Quantities* were a very important element of the tender submission because, ultimately, payments would be made on the basis of those prices

f) the other tenderer did submit all the information requested in the tender document

The Chairman Public Contracts Review Board remarked that it was the responsibility of the tenderer to make sure that such tenderer would have submitted a complete and correct tender submission, especially with regard to mandatory requirements. He added that the appellant company did provide literature with regard to certain items but, apparently, it refrained from doing the same with regard to five items of equipment.

At this point the Chairman Public Contracts Review Board referred to a part of a correspondence sent by the appellant company’s representative to the contracting authority and declared that pressure of work, last-minute rush or hitches were no justification for the omission of mandatory information.

Mr Bonello DuPuis explained that the items in respect of which the company did not submit literature were so clearly described in the tender document that it was felt that no further information was required in addition to that provided in the tender document while some other

items were rather of a common nature.

Ing. Cauchi rejected the explanation given by appellant and insisted that details about the items offered were essential and as examples he cited (i) the ‘filter basket’ which, according to him, if it were made of plastic instead of stainless steel, as requested, then that would affect both the quality/function and the price of the item and (ii) the ‘control panel’ on which depended the proper functioning of the fountain.

Dr Keith Grech, legal representative of 4H20 Ltd, referred to clause 3 of the ‘Technical Specifications’ (page 7) which, among other thing, stated (in bold caps):

“Following are suggested specifications for the equipment to be used. These are only intended as guides and should be followed as far as possible. However, alternative equipment may be suggested as long as the overall effect is achieved at no loss of quality.”

Dr Grech added that it was evident that the contracting authority was not binding tenderers to provide exactly what was requested but the tenderers were given the opportunity to offer alternatives. The appellant company’s legal representative remarked that it could well be that the items in respect of which no literature was submitted were alternatives to the items indicated in the tender document. Dr Grech insisted that his client’s offer was in fact a compliant offer.

Ing Cauchi conceded that albeit clause 3 did, in fact, allow tenderers to propose alternatives, yet the tenderer had to indicate such variations and the tenderer still had to furnish the literature in respect of the alternative items of equipment that the company would be offering. He concluded that the fact was that the appellant company submitted no technical literature for the items mentioned in the tender or for any alternative items that the company’s representative/s might have had in mind.

At this stage, all parties agreed that there was no issue with regard to the aspect of the tender referring to the maintenance of the equipment.

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 30th March 2011 and also through their verbal submissions presented during the hearing held on 8th April 2011, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company’s representatives’ claims and observations, particularly, the references made to the fact that (a) after the closing date of the tender, by way of an email addressed to the contracting authority, Mr Bonello Dupuis had claimed that the difference in the total price of the Bill of Quantities - which added up to €65,790.90 instead of €52,285.80 - represented the discount that the company was offering, (b) given

that his company's offer was cheaper than the recommended offer, 4H20 Ltd should have been awarded the tender, (c) the items in respect of which the company did not submit literature were so clearly described in the tender document that it was felt that no further information was required in addition to that provided in the tender document while some other items were rather of a common nature and (d) in the *Technical Specifications* it was evident that the contracting authority was not binding tenderers to provide exactly what was requested but the tenderers were given the opportunity to offer alternatives,

- having considered the contracting authority's representative's reference to the fact that (a) the total price that the M'Xlokk Local Council took into account was €65,790.90 and not €52,285.80 , (b) no discount was indicated by the appellant company in its original tender submission and that the appellant first mentioned the discount on being informed that, during adjudication, a discrepancy emerged between the sum of the sub-totals and the total in the Bill of Quantities, (c) the appellant company's bid was deficient in the sense that the *Bill of Quantities* did not include the rates but featured only the totals thereof and the contracting authority considered the rates/prices in the Bill of Quantities as a very important element of the tender submission because, ultimately, payments would be made on the basis of those prices, (d) the total of the *Bill of Quantities* did not match the sub-totals indicated by the tenderer, (e) the bid was technically non-compliant because no literature was submitted with regard to pre filter of filter basket, valves, control panel, pipes and fittings and water treatment equipment despite the fact that clause 2 of Annex 1 stated that "*Each offer shall include ... Description of the equipment and its components as offered together with all relevant manufacturers' catalogues, illustrations and diagrams.....*", (f) the other tenderer did submit all the information requested in the tender document and (g) albeit clause 3 of the *Technical Specifications* did, in fact, allow tenderers to propose alternatives, yet the tenderer had to indicate such variations and the tenderer still had to furnish the literature in respect of the alternative items of equipment that the company would be offering

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that the extract from the letter dated 24th March 2011 simply recounted the explanation given by the appellant company with regard to the discrepancy in the price total but it did not mean that the local council had accepted that explanation as valid.
2. The Public Contracts Review Board places major emphasis on the fact that it remains the responsibility of the tenderer to make sure that a tenderer would have submitted a complete and correct tender submission, especially with regard to mandatory requirements.
3. The Public Contracts Review Board concludes that since (a) no 'discount' was indicated by the appellant company in its original tender submission and (b) the appellant company first mentioned the discount on being informed that, during adjudication, a discrepancy emerged between the sum of the sub-totals and the total in the

Bill of Quantities, the whole process was rendered untenable as, at that stage, this was not a question of a clarification anymore.

4. The Public Contracts Review Board also concludes that the appellant company's bid was deficient in the sense that the *Bill of Quantities* did not include the rates but featured only the totals thereof.
5. The Public Contracts Review Board maintains that the bid was technically non-compliant because no literature was submitted with regard to items being offered when this request was a mandatory one.
6. The Public Contracts Review Board agrees with the evaluation board that, albeit clause 3 did in fact allow tenderers to propose alternatives, yet the tenderer had to not only to indicate such variations but still had to furnish the literature in respect of the alternative items of equipment that the company would be offering.

In view of the above this Board finds against the appellant company and also recommends that the deposit paid by the appellants should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel Esposito
Member

11 April 2011