

PUBLIC CONTRACTS REVIEW BOARD

Case No. 274

KLH-08-2010

Tender for the Installation of Electrical, Mechanical and Fire Safety Services at Car Park in Duke of Edinburgh Street, Hamrun

This call for tenders was published in the Government Gazette on 19th November 2010. The closing date for this call was 20th December 2010.

Two (2) tenderers submitted their offers.

Electrical and Mechanical Manufacturers Ltd filed an objection on 4th February 2011 against the decision by the Hamrun Local Council to disqualify its offer and to recommend the award of the tender to Engenuity Ltd.

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 Monday, 18th April 2011 to discuss this objection.

Present for the hearing were:

Electrical and Mechanical Manufacturers Ltd

Dr Ludvic Caruana
Mr Jack Mifsud

Legal Representative
Representative

Engenuity Ltd

Mr Jonathan Cauchi
Mr Mario Vella

Representative
Representative

Hamrun Local Council (HLC)

Dr Justyne Caruana
Mr Vincent Bonello
Mr Philip Massa
Ing. Jason Vella

Legal Representative
Mayor
Executive Secretary
Technical Adviser

The Chairman of the Public Contracts review Board informed those present that, following an exchange of correspondence between the Board, the contracting authority and the appellant company, the need was felt for a preliminary hearing to be held for the Board to (a) establish the facts surrounding this case and (b) determine if there were sufficient grounds to hold a public hearing on the objection raised by the appellant company.

At this point the Chairman invited the appellants' representative to explain the motives of the company's objection.

Dr Ludvic Caruana, legal representative of Electrical and Mechanical Manufacturers Ltd, explained that:

- a. Regulation 84 (1) of LN 296 of 2010 stated that:

“Any tenderer or candidate concerned, or any person, having or having had an interest or who has been harmed or risks being harmed by an alleged infringement or by any decision taken including a proposed award in obtaining a contract or a cancellation of a call for tender, may file a notice of objection with the Review Board.”

“The notice shall be filed within ten calendar days following the date on which the contracting authority has by fax or other electronic means sent its proposed award decision.”

- b. his clients had not been informed by fax or by any other electronic means but instead these were informed by post by letter dated 27th January 2011;
- c. Regulation 84 (1) also stated that:

“The communication to each tenderer of the proposed award shall be accompanied by a summary of the relevant reasons relating to the rejection of the tender as set out in regulation 44 (3) and by a precise statement of the exact standstill period.”

- d. the letter dated 27th January 2011 did not communicate the summary of the reasons for rejection and by a precise statement of the exact standstill period but it only communicated the following:

“Please refer to your Tender No.: KLH/TDR/08/2010 submitted on December 20th, 2010.

I have been instructed to inform you that following an evaluation process, the abovementioned Tender has been awarded.

Enclosed please find your Tender Guarantee which is no longer required.”

- e. in the circumstances, it was evident that the procedure stipulated by the regulations had

not been followed such that his client had not been notified, even up to the date of the hearing, of the reasons why the company's tender had been disqualified.

As a result of the above, concluded his intervention Dr Caruana, his client was not in a position to present the company's case.

Mr Jack Mifusd, also representing the appellant company, remarked that the contracting authority did send him a communication whereby he was informed that the engineer in charge of the project could not evaluate the company's submission.

Dr Justyne Caruana, legal advisor of the Hamrun Local Council, made the following remarks:

- a) the right of the tenderer to lodge an appeal had not been violated so much so that the said tenderer had made an appeal in time which was the subject of the hearing;
- b) the letter dated 27th January 2011 had to be seen in the light of various previous correspondence exchanged between the contracting authority and the tenderers, e.g. an email dated 7th February 2011 to Ms Gemma Debono of the Local Government Department listed this correspondence;
- c) the tender submitted by the appellant company did not conform with certain mandatory tender requirements, however, given that there was a substantial difference in the price offered by the two participating tenderers, the contracting authority decided to give the appellant company the opportunity to clarify its position, however, the same appellant still failed to submit what was requested of the company;
- d) it therefore followed that the appellant company had, in fact, been made aware of the shortcomings in its tender submission and its representative was even asked to rectify them prior to the letter of the 27th January 2011; and
- e) one of the shortcomings was that tenderers had been requested to submit, among other things, a design whereas the appellant company only submitted a brochure.

The Chairman Public Contracts Review Board observed that if the appellant company failed to submit mandatory information in its original tender submission then there was no need for the evaluation board to ask for any clarifications and that the tender should have been discarded there and then. He added that, in other words, the contracting authority should have acted according to regulations and disqualified the appellant company because, after all, it was the responsibility of the tenderer to present a compliant tender submission in the first place.

The Chairman Public Contracts Review Board pointed out that, apart from the correspondence exchanged, the letter of rejection sent to the appellant company on the 27th January 2011 should have included the reasons for the disqualification.

Ing. Jason Vella, technical adviser to the Hamrun Local Council, made the following submission:-

- a) there were two requests for clarifications, one the reply for which was requested on the same day, which, admittedly, the time given might have been rather tight but, on the other hand, one had to appreciate that the information requested should have been readily available and, moreover, should have been submitted in the original tender submission; and
- b) a good part of the discrepancy that arose concerned the design of the pressurized system that was to be installed in the shaft which was a life saving system in case of fire which information was not forthcoming from the appellant company even after the clarification so much so that all that the appellant company submitted was a brochure whereas the contracting authority requested the design of the system to enable it to technically evaluate the offer.

Mr Mifsud remarked that on the 12th January 2011 he was requested by the contracting authority to give certain details, e.g. code numbers, by that same day and that it was not possible for him to answer within such a short timeframe. The same appellant company's representative contended that his reply to the clarification amounted to a confirmation that his offer complied with tender specifications and added that the contracting authority did not, in any way, inform him that his reply was insufficient.

Dr Justyne Caruana informed the Public Contracts Review Board that the tenderer and, for all that matters, anyone could have attended Council meeting no. 288 held in public on the 20th January 2011 to discuss this specific tender. At this point Dr Caruana tabled a copy of the relevant minutes.

Dr Ludvic Caruana reiterated that in this case the Hamrun Local Council did not abide by regulations and, as a result, the proceedings should be considered null.

The Chairman Public Contracts Review Board remarked that (a) it was unheard of that a tenderer be requested to submit a clarification within hours; (b) the tendering company should have submitted the design in its original submission and it even failed to do so following the clarification request and (c) given that the missing information was a mandatory requirement, no clarification should have been requested in the first place.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants through both correspondence entered into and their verbal submissions presented during the hearing held on 18th April 2011, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representatives' claims;

- having considered the contracting authority's representatives' counter arguments and observations,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that, apart from the correspondence exchanged, the letter of rejection sent to the appellant company on the 27th January 2011 should have included the reasons for the disqualification.
2. The Public Contracts Review Board feels that, since the appellant company failed to submit mandatory information in its original tender submission, there was no need for the evaluation board to ask for clarifications and that the tender should have been discarded there and then.
3. The Public Contracts Review Board places emphasis on the fact that it remains the responsibility of the tenderer to present a fully compliant tender submission in the first place.
4. The Public Contracts Review Board also feels that the appellant company was obliged to submit the design in its original submission and the arguments brought forward by the appellant company's representatives during the hearing failed to provide concrete and convincing counter arguments.

In view of the above this Board

- (a) finds against the appellant company

and

- (b) taking full cognisance of the fact that the contracting authority should have included the reasons for the disqualification which could have, possibly, dissuaded the appellant company from formally filing the complaint, recommends that the deposit paid by the said appellants should be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel Esposito
Member

28 April 2011