

PUBLIC CONTRACTS REVIEW BOARD

Case No. 349

MRRA/W/681/2010/1

Tender for the Supply, Installation and Maintenance of the LPG System of two in number ornamental flames at the War Memorial, Floriana

This call for tenders was published in the Government Gazette on 16th August 2011. The closing date for this call with an estimated budget of €24,000 was the 6th September 2011.

Three (3) tenderers submitted their offers.

A. Falzon Energy Projects Ltd filed an objection on the 7th October 2011 against the decision taken by the Ministry for Resources and Rural Affairs to disqualify its tender submission as technically not compliant since 'no details of the proposed burner were submitted as requested'.

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 Wednesday, 2nd December 2011 to discuss this objection.

Present for the hearing were:

A. Falzon Energy Projects Ltd

Dr Lennart Depasquale	Legal Representative
Mr Anthony Falzon	Representative
Ing. Fabio Stivala	Representative

Easygas Malta Ltd: (no representative turned up)

Ministry for Resources and Rural Affairs (MRRA)

Adujdicating Board

Ing. Brian Cauchi	Chairman
Ing. George Xuereb	Member
Arch. Claire Vassallo	Member

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

Dr Lennart Depasquale, legal representative of A. Falzon Energy Projects Ltd, the appellant company, made the following submissions:

- i. by letter dated 3rd October 2011, the contracting authority had communicated to his client that its offer was found technically not compliant as 'no details of the proposed burner were submitted as requested';
- ii. the tender document indicated that a site visit was to be held which date turned out to be the same date on which his client picked up the tender document and hence he could not attend;
- iii. his client's request via email to be given the opportunity to visit the site had been turned down by the contracting authority; and
- iv. the contracting authority even turned down his client's requests for the site plan and for the minutes of the on-site meeting.

Mr Anthony Falzon, also representing the appellant company, remarked that he requested a site visit because he wished to obtain more details about the burner/flame and to have an exchange of views. He added that it did not occur to him to request prior to the closing date of the tender that the tendering process be brought to a halt because it failed to provide certain information. Mr Falzon repeated what his firm had stated in its email dated 22nd September 2011 in the sense that, once he had not been given the opportunity to visit the site and to see the ornamental structure, he could not furnish the contracting authority with the design of the flame burner.

Ing Brian Cauchi, chairman of the adjudicating board, offered the following explanations:

- a. according to clause 8.4 of the tender document, the site visit – at the War Memorial in Floriana - was scheduled for the 23rd August 2011 and it happened that no one turned up for that site visit and, as a consequence, no minutes were drawn up. That information was communicated to the appellant company through an email dated 25th August 2011;
- b. the date of the site visit was fixed in line with the tender template, namely one week from the publishing date and two weeks from the closing date, keeping in mind that there were a number of days before the closing date during which one could not raise any queries. These conditions were applicable to all tenderers;
- c. the fact that none of the bidders turned up meant that no clarifications were raised or, somehow, communicated and therefore the appellant company definitely was not at a disadvantage *vis-a-vis* the other bidders;

- d. the location of the site in question, the War Memorial at Floriana, was included in the tender title itself and it turned out to be a public and prominent place which anyone could visit at will at all times;
- e. Annex 'B' of the tender document provided the site plan and a detailed drawing of the bronze stand on which the flame was to be displayed;
- f. albeit the contracting authority was quite satisfied with all the other details furnished by the appellant company, yet, the fact remained that the appellant company did not submit the details of the main item requested in the tender, namely the burner, and that rendered the submission technically not compliant;
- g. the appellant company was also requested by email dated 19th September 2011 (1) to supply details and drawings for the flame burner being proposed in its offer keeping in mind the design of the bronze flame structure so that those would not be visible and (2) to indicate where similar burners had been installed. The appellant company failed to provide this information and even declared that it had not provided similar supplies before but provided an image of a gas flame used at the abattoir which was totally different from the flame requested in this tender; and
- h. the other bidders did not seem to have had any problems in compiling their tender submissions such that no clarifications had been sought even though they did not attend the on-site visit and that demonstrated that the tender document was comprehensive and that there was a level playing field for all bidders throughout the process.

The Chairman, Public Contracts Review Board, remarked that one should not expect the contracting authority to answer queries the answers for which were already provided for in the tender document or else to provide information that was public knowledge. He added that, evidently, the adjudication board was not in a position to evaluate the flame burner since the relative information had not been provided by the appellant company in its original tender submission and not even when the latter's officials were asked to do so through a clarification.

Mr Falzon remarked that since, until then, no such ornamental flames had been installed in Malta then it was not possible for any local bidder to provide the past experience requested.

Ing Cauchi replied that, by way of experience on similar supplies/works, the appellant company could have presented the experience of its overseas supplier, namely where similar ornamental flames had been installed overseas.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant's company, in terms of the reasoned letter of objection dated 7th October 2011 and through the verbal submissions made during the hearing held on the 2nd December 2011, had objected against the decision taken by the Ministry for Resources and Rural Affairs to disqualify its tender submission as technically not compliant since 'no details of the proposed burner were submitted as requested';
- having noted the appellant firm's representatives claims and observations regarding the fact that (a) by letter dated 3rd October 2011, the contracting authority had communicated to the appellant company that its offer was found technically not compliant as 'no details of the proposed burner were submitted as requested', (b) the tender document indicated that a site visit was to be held which date turned out to be the same date on which the appellant company's representative picked up the tender document and hence the same representative could not attend to the said site visit, (c) the request which was sent via email to the contracting authority to be given the opportunity to visit the site had been turned down by the latter, (d) the contracting authority even turned down the appellant company's requests for the site plan and for the minutes of the on-site meeting, (e) a site visit was requested because Mr Falzon wished to obtain more details about the burner/flame and to have an exchange of views, (f) once the company had not been given the opportunity to visit the site and to see the ornamental structure, its representative could not furnish the contracting authority with the design of the flame burner and (g) since, until then, no such ornamental flames had been installed in Malta then it was not possible for any local bidder to provide the past experience requested;
- having considered the contracting authority's representative's submissions, namely that (a) according to clause 8.4 of the tender document, the site visit – at the War Memorial in Floriana - was scheduled for the 23rd August 2011 and it happened that no one turned up for that site visit and, as a consequence, no minutes were drawn up, (b) the date of the site visit was fixed in line with the tender template, namely one week from the publishing date and two weeks from the closing date, keeping in mind that there were a number of days before the closing date during which one could not raise any queries with such conditions being applicable to all tenderers, (c) the fact that none of the bidders turned up meant that no clarifications were raised or, somehow, communicated and therefore the appellant company definitely was not at a disadvantage *vis-a-vis* the other bidders, (d) the location of the site in question, the War Memorial at Floriana, was included in the tender title itself and it turned out to be a public and prominent place which anyone could visit at will at all times, (e) Annex 'B' of the tender document provided the site plan and a detailed drawing of the bronze stand on which the flame was to be displayed, (f) albeit the contracting authority was quite satisfied with all the other details furnished by the appellant company, yet, the fact remained that the appellant company did not submit the details of the main item requested in the tender, namely the burner, and that rendered the submission technically not compliant, (g) albeit the appellant company had also been requested by email dated 19th September 2011 (1) to supply details and drawings for the flame burner being proposed in its offer keeping in mind the design of the

bronze flame structure so that those would not be visible and (2) to indicate where similar burners had been installed, yet, it failed to provide this information and even declared that it had not provided similar supplies before but provided an image of a gas flame used at the abattoir which was totally different from the flame requested in this tender, (h) the other bidders did not seem to have had any problems in compiling their tender submissions such that no clarifications had been sought even though they did not attend the on-site visit and that demonstrated that the tender document was comprehensive and that there was a level playing field for all bidders throughout the process and (i) by way of experience on similar supplies/works, the appellant company could have presented the experience of its overseas supplier, namely where similar ornamental flames had been installed overseas,

reached the following conclusions:

1. The Public Contracts Review Board acknowledges the fact that the date of the site visit was fixed in line with the tender template, namely one week from the publishing date and two weeks from the closing date, keeping in mind that there were a number of days before the closing date during which one could not raise any queries with such conditions being applicable to all tenderers.
2. The Public Contracts Review Board feels that the fact that none of the bidders turned up meant that no clarifications were raised or, somehow, communicated implied that the appellant company was definitely not at a disadvantage *vis-a-vis* the other bidders. Furthermore, it was evident that the other bidders did not seem to have had any problems in compiling their tender submissions such that no clarifications had been sought even though they did not attend the on-site visit and that demonstrated that the tender document was comprehensive and that there was a level playing field for all bidders throughout the process.
3. This Board concurs with the argument raised by the contracting authority wherein it was contended that (a) the location of the site in question, the War Memorial at Floriana, was included in the tender title itself, (b) the location of the site in question is also a public and prominent place which anyone could visit at will at all times and (c) Annex 'B' of the tender document provided the site plan and a detailed drawing of the bronze stand on which the flame was to be displayed.
4. The Public Contracts Review Board opines that that one should not expect a contracting authority to answer queries the answers for which were already provided for in the tender document or else to provide information that was public knowledge.
5. The Public Contracts Review Board also agrees with the evaluation board's conclusion, namely that albeit the contracting authority was quite satisfied with all the other details furnished by the appellant company, yet, the fact remained that the appellant company did not submit the details of the main item requested in the tender, namely the burner, and that rendered the submission technically not compliant.

6. This Board fails to comprehend why, despite the fact that the appellant company had also been requested by email dated 19th September 2011 (1) to supply details and drawings for the flame burner being proposed in its offer keeping in mind the design of the bronze flame structure so that those would not be visible and (2) to indicate where similar burners had been installed, yet, it failed to provide this information.

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

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel Esposito
Member

9th December 2011