

PUBLIC CONTRACTS REVIEW BOARD

Case No. 352

UM 1539

Tender for Tiling and Paviour Works, Sanitary Ware and Steelworks at FEMA Building Extension Blocks A & B at the University of Malta

This call for tenders was published in the Government Gazette on 22nd March 2011. The closing date for offers was 4th May 2011.

The estimated value of this tender was €113,322.23(excl VAT)

Seven (7) tenderers had originally submitted their offers.

Messrs Avantgarde Projects Ltd filed an objection on 20th July 2011 against the decision by the University of Malta to disqualify its tender submission as administratively not compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr Edwin Muscat and Mr Carmel Esposito as members convened a meeting on Tuesday 6th December 2011 to discuss this objection.

Present for the hearing were:

Avantgarde Projects Ltd

Mr Joe Vella	Managing Director
Mr Ray Pellicano	Representative

Vella Falzon Group Ltd

Dr Nicolai Vella Falzon	Legal Representative
Mr Charles Fenech	Representative

University of Malta

Dr Charmaine Cristiano	Legal Representative
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Adujdicating Board

Mr Tonio Mallia	Chairman
Mr Johann Calamatta	Secretary

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

Mr Joe Vella, representing Avantgarde Projects Ltd, the appellant company, made the following submissions:

- i. He stated that by email dated 19th July 2011 the University of Malta had informed him that his firm's offer was found administratively not compliant for the following reasons, namely the company:-
 - a. did not submit adequate information regarding the Tenderer's Personnel (Form 5) as specified in Clause 10.1 Volume 1 of the *Instructions to Tenderers*, forming part of the tender document;
 - b. indicated that the company would be operating without sub-contractors and yet in Form 5 (Overview of Tenderer's Personnel) only seven persons were indicated, four of whom were administrative, one engineer, one surveyor and one foreman. It was therefore unclear who exactly was going to perform the work itself;
 - c. did not submit a *Quality Assurance Plan* (Form 8), as clearly specified in Clause 10.1 Volume 1 of the *Instructions to Tenderers*, forming part of the tender document;
 - d. did not submit the technical literature as specified in Clause 16.1 (e) (ii) as requested and, from the technical literature requested, only that pertaining to the sanitary ware and hand dryer were submitted;and
 - e. did not submit the technical literature for the tiles
- ii. with regard to points (a) and (b) the tender document clearly indicated that Form 5 'Overview of Tenderer's Personnel - was 'Not Applicable'. That notwithstanding, the appellant company did indicate the top administrative, professional and technical staff but not of the tile layer/s;
- iii. similarly, with regard to point (c), Form 8 was to be filled in 'where applicable' and the company's representative had filled it in as far as it was applicable to his case; and
- iv. concerning points (d) and (e) Mr Vella referred to the note to Clause 16.1 of the tender document which provided that tenderers "*will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within two working days from notification*". Hence, he contended, if there were any missing documents, the contracting authority could have asked the tenderer to submit them.

Mr Tonio Mallia, chairman of the adjudicating board, submitted that:-

- a. the contracting authority had reviewed the process and it conceded that the appellant company was not at fault with regard to points (a) to (c) and, as a result, those justifications for exclusions were being dropped;
- b. with regard to the submission of literature/samples, clause 16.1 of the tender document requested, among other things, that:

*“the tender must comprise the following duly completed documents –
(e) ‘Evaluation Criteria/Technical Specifications’;
(ii) ‘Literature/List of Samples;’”*

- c. note 3 against clause 16.1 (e) stated that

“No rectification shall be allowed. Only clarifications on the submitted information may be requested”;

and

- d. it was the norm for bidders to submit samples of the items/material that they would be using in the course of the execution of the works included in the contract and the tender document contained the technical specifications of the items/material that were to be used.

Mr Vella intervened and stated that, in the covering letter to his company’s tender submission, he had personally declared in clear terms that the company could not submit the technical specifications of the tiles because, in the first instance, the contracting authority had to select the type of tile/s that it required and that it was only then that the company would be able to provide all the technical information relative to the selected tile/s. He added that it was standard that all the tiles on the market had to have their technical specifications and the appellant company had no less than 300 different types of tiles which were all compliant with the tender technical specifications. Mr Vella complained that, whereas the tender document referred to British Standards, the tile manufacturing sector was predominantly influenced by the Italian tile manufacturing industry.

The Chairman remarked that the Public Contracts Review Board was not questioning the appellant company’s competence but the primary concern of the Board in this case was how the tendering process was conducted. He stressed that whenever a tenderer noted that a tender condition or specification was not making sense or required clarification, then the tenderer had the right and the opportunity to communicate one’s concerns to the contracting authority prior to the closing date of the tender so that, if the contracting authority would accept that a clarification was warranted, then it would issue such a clarification to all prospective bidders and include it as part of the tender document. The Chairman Public Contracts Review Board declared that the tenderer could not, unilaterally, decide not to submit mandatory requirements.

Dr Nicolai Vella Falzon, representing the recommended tenderer, made the following remarks:-

- a. it was standard practice in public procurement that whenever a particular standard was quoted it was followed by the term ‘or equivalent’;
- b. the appellant company had quoted a price against the item marked ‘tiles’ and, as a consequence, it followed that the quoted price must have been associated with a particular type of tile and so all that the appellant company had to do was simply to provide a sample thereof;
- c. according to the tender document, the literature and samples were mandatory requirements in respect of which no rectifications were allowed;

and

- d. if the appellant company was in disagreement with any of the tender provisions its representative/s could have raised one’s concern prior to the closing date of the tender and not at appeal stage.

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 20th July 2011 and through the verbal submissions made during the hearing held on the 6th December 2011, had objected against the decision by the University of Malta to disqualify its tender submission as administratively not compliant;
- having noted the appellant firm’s representatives claims and observations regarding the fact that (a) the appellant company did not submit adequate information regarding the Tenderer’s Personnel (Form 5) as specified in Clause 10.1 Volume 1 of the *Instructions to Tenderers*, forming part of the tender document, (b) whilst the appellant company had indicated that the company would be operating without sub-contractors, yet, in Form 5 (Overview of Tenderer’s Personnel), only seven persons were indicated, four of whom were administrative, one engineer, one surveyor and one foreman thus rendering content as unclear as to who exactly was going to perform the work itself, (c) the appellant company did not submit a *Quality Assurance Plan* (Form 8), as clearly specified in Clause 10.1 Volume 1 of the *Instructions to Tenderers*, forming part of the tender document, (d) the appellant company did not submit the technical literature as specified in *Clause 16.1 (e) (ii)* as requested and, from the technical literature requested, only that pertaining to the sanitary ware and hand dryer were submitted, (e) the appellant company did not submit the technical literature for the tiles, (f) despite the fact that, with regard to points (a) and (b) the tender document clearly indicated that Form 5 ‘Overview of Tenderer’s Personnel - was ‘Not Applicable’, the appellant company did indicate the top administrative, professional and technical staff but not of the tile layer/s, (g) similarly, with regard to point (c), Form 8 was to be filled in ‘where applicable’ and the company’s representative had filled it in as far as it was applicable to his case, (h) the appellant company contended that if there were any missing documents, the contracting authority could have asked the tenderer to submit them and this would have been in line with note to Clause 16.1 of the tender document

which provided that tenderers “*will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within two working days from notification*”, (i) in the covering letter to the appellant company’s tender submission, the latter’s representative had personally declared in clear terms that the company could not submit the technical specifications of the tiles because, in the first instance, the contracting authority had to select the type of tile/s that it required and that it was only then that the company would be able to provide all the technical information relative to the selected tile/s, (j) it was standard that all the tiles on the market had to have their technical specifications and the appellant company had no less than 300 different types of tiles which were all compliant with the tender technical specifications and (k) whereas the tender document referred to British Standards, the tile manufacturing sector was predominantly influenced by the Italian tile manufacturing industry;

- having considered the contracting authority’s representative’s submissions, namely that (a) the contracting authority had reviewed the process and it conceded that the appellant company was not at fault with regard to points (a) to (c) and, as a result, those justifications for exclusions were being dropped, (b) with regard to the submission of literature/samples, clause 16.1 of the tender document requested, among other things, that “*the tender must comprise the following duly completed documents – (e) ‘Evaluation Criteria/Technical Specifications’:(ii) ‘Literature/List of Samples’*”, (c) note 3 against *clause 16.1 (e)* stated that “*No rectification shall be allowed. Only clarifications on the submitted information may be requested*” and (d) it was the norm for bidders to submit samples of the items/material that they would be using in the course of the execution of the works included in the contract and the tender document contained the technical specifications of the items/material that were to be used;
- having also reflected on the claims and interventions made by representatives of the recommended tenderer, especially those relating to the fact that (a) it was standard practice in public procurement that whenever a particular standard was quoted it was followed by the term ‘or equivalent’, (b) the appellant company had quoted a price against the item marked ‘tiles’ and, as a consequence, it followed that the quoted price must have been associated with a particular type of tile and so all that the appellant company had to do was simply to provide a sample thereof, (c) according to the tender document, the literature and samples were mandatory requirements in respect of which no rectifications were allowed and (d) if the appellant company was in disagreement with any of the tender provisions, its representative/s could have raised one’s concern prior to the closing date of the tender and not at appeal stage,

reached the following conclusions:

1. The Public Contracts Review Board feels that if the appellant company was in disagreement with any of the tender provisions, its representative/s could have raised one’s concern prior to the closing date of the tender and not at appeal stage.

2. The Public Contracts Review Board argues that a tenderer cannot, unilaterally, decide not to submit whatever is mandatory for participating tenderers to do so.

3. The Public Contracts Review Board opines that, according to the tender document, the literature and samples were mandatory requirements in respect of which no rectifications were allowed.

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 J Esposito
Member

29th December 2011