

PUBLIC CONTRACTS REVIEW BOARD

Case No. 258 and Case No. 259

MRRA/A/221/2010 – Tender for the Supply, Delivery, Installation and Commissioning of Glass Houses at the Department of Agriculture National Research and Development Centre Ghammieri - Marsa

This call for tenders was published in the Government Gazette on 27th July 2010. The closing date for this call for offers with a department estimate of € 116,112 was 7th September 2010.

Four (4) tenderers submitted a total of five options.

Case No. 258

Agriproducts Ltd filed an objection on 9th December 2010 against the decisions taken by the Evaluation Board to desist from considering further the appellant company's offer due to the latter's bid being deemed as technically not compliant.

Case No. 259

Martin Grima Ltd filed an objection on 8th December 2010 against the decisions taken by the Evaluation Board to (a) desist from considering further the appellant company's offer due to the latter's bid being deemed as technically not compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmelo Esposito as members convened a public hearing on Friday, 4th February 2011 to discuss this objection.

Present for the hearing were:

Agriproducts Ltd
Mr Jeffrey Debono

Martin Grima Ltd
Dr Alesia Zammit McKeon Legal Representative
Mr Martin Grima
Mr Carl Grima

Joseph Muscat
Mr Joseph Muscat

Ministry for Resources and Rural Affairs (MRRA)

Evaluation Board

Mr Noel Azzopardi	Chairman
Mr Mario Falzon	Evaluator
Mr Carmelo Briffa	Evaluator
Mr Darren Borg	Evaluator

At the beginning of this public hearing, the Chairman, Public Contracts Review Board explained that, since these two objections concerned the same call for tenders, it was decided to hold a joint hearing. Nevertheless, the parties concerned were also informed that, in spite of this, the two cases would be dealt with and decided upon separately.

The Chairman, Public Contracts Review Board then invited the representative of Agriproducts Ltd and *Martin Grima Ltd* to explain the motives of their objections.

Agriproducts Ltd

Mr Jeffrey Debono, representing Agriproducts Ltd, started by stating that the contracting authority had informed them that their offer was not accepted because the ventilation was not motorised. He explained that, as a standard, their manufacturer supplied roller side vents that operated manually by means of a manual gearbox. Mr Debono continued his intervention by adding that the mechanism could be modified according to the needs of their client and this was the reason why, in their offer, they indicated that the vents could be upgraded to motorised roller vents. It was further explained that Agriproducts Ltd also stated that the motorised vents could be connected to a climate control computer, which was the only item that was not included in their offer.

In reply to a specific question by the Public Contracts Review Board, Mr Debono said that the climate control computer was not requested in the tender and that they were allowed to recommend other features and accessories separately.

Martin Grima Ltd

Mr Martin Grima, representing Martin Grima Ltd, the other appellant company, said that they were informed that their offer was rejected because it was not technically compliant. He claimed that when he went to enquire about the matter the reason given to him was that they did not mention motorised vents in their offer. Mr Grima claimed that they did not need to mention motorised or manual vents in their offer because they had to offer what was requested by the client. Mr Grima contended that if the tender specifications requested that the vents should be electrically operated then they had to submit their offer in conformity with such specifications.

Dr Alison Zammit McKeon, legal representative of Martin Grima Ltd, said that her clients had informed her they had provided motorised vents as requested in the call for tenders. At this point she invited the Public Contracts Review Board to refer to Note 3 of page 20 of the tender document which stated that:

Tenders 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.

Dr Zammit McKeon argued that if Martin Grima Ltd's offer had incomplete information, instead of disqualifying the offer, the Evaluation Board could have asked her client for a clarification.

The appellant company's legal advisor also pointed out that priority was given to the technical capacity of the tenderer, so much so that, in page 19 of the tender document, it was specified that tenderers had to provide the *List of Principal Deliveries*. Dr Zammit McKeon sustained that Martin Grima Ltd had extensive experience in greenhouses projects.

Submissions by the Evaluation Board

Agriproducts Ltd's offer:

Mr Noel Azzopardi, Chairman of the Evaluation Board, replied by stating that, when they analysed Agriproducts Ltd's technical specifications it was understood that the side vents were manually operated with the option of upgrading them to being motorised at a later stage. Mr Azzopardi said that although it was not indicated that it would be offered at an extra charge it was neither stated that it was included in the offer. As a consequence, continued the Board's Chairman, the said Board interpreted that the price given reflected the cost of manually operated side vents only and, as a result, it was concluded that if one were to opt to install a motor at a later stage one would have to enter into an additional expense.

The Chairman Public Contracts Review Board drew the attention of Evaluation Board members present for the hearing that, in their report, it was indicated that they had asked Mr Joseph Muscat for a clarification by asking him to submit a '*Confirmation whether or not glass houses side ventilation are electrically driven or manually operated.*' When asked to state why the same clarification was not sent also to the other bidders, the Chairman, Evaluation Board, replied that, after discussing the matter with the Ministry's Committee, it was decided that a clarification should be sought from Mr Muscat only because, although in his specifications it was indicated that the five greenhouses were equipped with a '*motor gear box system with telescopic arms for opening and closing the windows*', they wanted to ensure that the gear box was electrically operated. Mr Azzopardi said that their intention was to avoid problems after award of tender.

Mr Debono pointed out that the only item that was not included in their offer was the climate control computer which was not requested in the tender document. At this point he quoted from para 1.6 'Ventilation System' of page 9/12 of their offer which specified that:

'Roller side vents are operated manually by means of a manual gearbox. These also could be upgraded to a motorised roller vents which could be connected to the same climate control computer. Please note that climate control computer is not included in the offer.'

Mr Azzopardi reiterated that they interpreted this to mean that the motorised vents were not included in their offer. The Public Contracts Review Board said that, taking into consideration the fact that it was stated that "it could be upgraded to a motorised roller vents" it was not clear whether motorised vents were included or not.

Mr Joseph Muscat, representing an interested party, intervened by stating that in their quotation it was clearly indicated that the vents were motorised. The Chairman, Public Contracts Review Board intervened to remark that, in spite of the fact that it was clear, they still asked for a clarification. Mr Joseph Muscat insisted that they did not ask for a clarification but a confirmation.

Martin Grima Ltd's offer

With regard to Martin Grima Ltd's offer, Mr Azzopardi said that it was not technically compliant since specifications submitted were not clear, namely they did not indicate that the ventilation was motorised and did not include the *ante* room which was mandatory.

Dr Zammit McKeon said that, once they were not clear, they should have sought a clarification. The Chairman, Public Contracts Review Board drew her attention that a clarification could not be sought on everything or on something that was not submitted.

In reply to Dr Zammit McKeon's remark wherein the idea was given that the anteroom was an integral part of the system, Mr Azzopardi said that, contrary to what had been stated, a glasshouse did not necessarily have an ante room and bidders had to supply five (5) glasshouses each having an anteroom.

Replying to a specific question by the lawyer, Mr Azzopardi said that the anteroom was required in Volume 3 'Technical Specifications' of the tender document, namely, 'Double front door entrance 1.5 mtrs wide'.

The Chairman Public Contracts Review Board drew the attention of those present that if a contracting authority requested something it was the responsibility of the bidder to show and specify that it was being submitted.

Mr Grima argued that, once the specification included an anteroom, he would only have to specify if they did not offer it. The Chairman, Public Contracts Review Board said that bidders were required to indicate clearly what was being submitted. Dr Zammit McKeon intervened by making reference to the brochure that was submitted with their offer. She said that the brochure showed a picture of the whole glasshouse which included the anteroom.

At this point, the Public Contracts Review Board asked the members of the Evaluation Board, namely Messrs Noel Azzopardi, Carmelo Briffa, Mario Falzon and Darren Borg to take the witness stand. Under oath they all declared that (i) they had seen and analysed the brochure during evaluation and (ii) they could not identify the anteroom. In reply to a specific question by the Public Contracts Review Board the last three witnesses stated that they had 8 years, 2 years and 6 years experience in glasshouses respectively.

Mr Grima, under oath, said that he could identify the anteroom on the brochure, however, when this was shown again to the other witnesses they all declared that they could not recognise where the anteroom was.

When one of the members of the board said that it was not a drawing, his attention was drawn by the Public Contracts Review Board that it did not appear that they requested such a drawing in the tender document. Mr Azzopardi said that, as far as he was aware, bidders were required to provide drawings of the green houses and that the anteroom would have featured in such drawings. Mr Joseph Muscat said that, after the site visit, participants were verbally requested to submit drawings. Mr Debono confirmed that they had submitted drawings with their tender and that these included the anteroom. It was established that the drawings were requested in an e-mail dated 17 August 2010 that was sent to all bidders after the site visit wherein it was stated:

“Drawings: clause 14. it was agreed that bidders are expected to provide drawings of the green and shading houses”

Mr Grima declared that they did not submit the drawings.

Mr Debono concluded by referring to the fact that in their offer they stated that the vents could be upgraded to motorised vents due to the fact that each glass house had to conform with the tender’s technical specifications which, *inter alia*, included the ‘*Electrical motors for opening and closing of vents*’.

Mr Azzopardi reiterated the Board’s position that they interpreted Agriproducts Ltd’s offer that the vents were being offered as manual with the possibility of installing motors in future.

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 9th December 2010 (Case No. 258) and 8th December 2010 (Case No. 259, respectively, as well as, through their verbal submissions presented during the hearing held on the 4th February 2011, had objected to the decision taken by the pertinent authorities;
- having noted the appellant company’s (Case No. 258) representatives’ (a) reference to the fact that their offer was not accepted because the ventilation of the product offered by them was not motorised, (b) claim that their manufacturer supplied roller side vents that operated manually by means of a manual gearbox and that the mechanism could be modified according to the needs of their client and this was the reason why, in their offer, they indicated that the vents could be upgraded to motorised roller vents and (c) explanation that the motorised vents could be connected to a climate control computer which was the only item that was not included in their offer;
- having noted the appellant company’s (Case No. 259) representatives’ (a) reference to the fact that they were informed that their offer was rejected because it was not technically compliant since they did not mention motorised vents in their offer, (b) claim that they did not need to mention motorised or manual vents in their offer because they had to offer what was requested by the client, (c) claim that if the

- company's offer had incomplete information, instead of disqualifying the offer, the Evaluation Board could have asked for a clarification, (d) argument that, once the specification included an anteroom, the company would only have to specify if they did not offer it, (e) reference to the point that the brochure that was submitted with their offer showed a picture of the whole glasshouse which included the anteroom and (f) admission that they did not submit the drawings;
- having, with regards to Case No. 258 considered the contracting authority's (a) reference to the fact that when the appellant company's technical specifications was analysed, it was understood that the side vents were manually operated with the option of upgrading them to being motorised at a later stage, (b) claim that although the option was not indicated that it would be offered at an extra charge it was neither stated that it was included in the offer, (c) statement that it interpreted that the price given reflected the cost of manually operated side vents only and, as a result, it was concluded that if one were to opt to install a motor at a later stage one would have to enter into an additional expense and (d) claim that para 1.6 'Ventilation System' of page 9/12 of the appellant company's offer was interpreted by the Evaluation Board that they interpreted this to mean that the motorised vents were not included in their offer;
 - having, with regards to Case No. 259 considered the contracting authority's (a) claim that the appellant company's offer was not technically compliant since specifications submitted were not clear, namely they did not indicate that the ventilation was motorised and did not include the *ante* room which was mandatory, (b) claim that contrary to what had been stated, a glasshouse did not necessarily have an ante room and bidders had to supply five (5) glasshouses each having an anteroom and the latter was required in Volume 3 'Technical Specifications' of the tender document, namely, 'Double front door entrance 1.5 mtrs wide' and (c) reference to the fact that bidders were required to provide drawings of the green houses and that the anteroom would have featured in such drawings as reflected in an e-mail dated 17 August 2010 that was sent to all bidders after the site visit;
 - having taken particular note of Mr Joseph Muscat's intervention, particularly, his claim that (a) in their quotation it was clearly indicated that the vents were motorised and (b) reference to the fact that , after the site visit, participants were verbally requested to submit drawings;
 - having deliberated upon the fact that all the members of the Evaluation Board declared that they (i) had seen and analysed the brochure during evaluation and (ii) could not identify the anteroom,

reached the following conclusions, namely:

1. The Public Contracts Review Board acknowledges that, with regard to Case No. 258, it seemed evident that albeit the appellant company's manufacturer supplied roller side vents that operated manually by means of a manual gearbox and that the mechanism could be modified according to anyone's needs, yet the contracting authority concluded that, despite the fact that the option was not indicated that it would be offered at an extra charge, it was neither stated that it was included in the offer and this was somehow interpreted by the same contracting authority that the

price given reflected the cost of manually operated side vents only and, as a result, it was concluded that if one were to opt to install a motor at a later stage one would have to enter into an additional expense. This Board opines that since there may have been a sense of ambiguity the evaluation board could have opted for a mere clarification.

2. The Public Contracts Review Board feels that, with regard to Case No. 259 wherein the appellant company, inter alia, stated that if the tenderers' offer had incomplete information, instead of disqualifying the offer, the evaluation board could have asked for a clarification, this Board opines that a clarification cannot be sought on everything or on something that was not submitted.
3. Also, with reference to Case No. 259, especially with regard to the appellants' argument that, once the specification included an anteroom, the company would only have to specify if they did not offer it, as transpired during the hearing, such requirement was mandatory, so much so that bidders were required to provide drawings of the green houses and that the anteroom would have featured in such drawings as reflected in an e-mail dated 17 August 2010 that was sent to all bidders after the site visit. As a consequence, this Board concludes that, since a tenderer is not at liberty to arbitrarily select what to submit or not, the appellant company was obliged to submit the said drawings and in not doing so it reneged on fulfilling one of the mandatory requirements.

In view of the above this Board finds

- a. in case of Case No. 258 in favour of the appellant company
- b. in case of Case No. 259 against the appellant company

Furthermore, this Board also recommends that, with reference to:

- a. Case No. 258 the deposit paid by the appellants should be reimbursed
- b. Case No. 259 the deposit paid by the appellants should not be reimbursed

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmelo Esposito
Member

16 February 2011