

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 366

**CT/2081/2011; CT/120/2011**

**Tender for the Supply, Installation, Testing and Commissioning of a Photovoltaic System at the Ministry for Gozo**

This call for tenders was published in the Government Gazette on 29<sup>th</sup> April 2011. The closing date for offers was 21<sup>st</sup> June 2011.

The estimated value of this tender was € 220,000.

Eight (8) tenderers submitted their offers.

Electrofix Energy Ltd filed an objection letter dated 26<sup>th</sup> September 2011 against the decisions of the Department of Contracts to disqualify its offer as administratively non-compliant and to recommend the cancellation of the call for tenders.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr Carmel Esposito and Mr Joseph Croker as members convened a meeting on Wednesday 18<sup>th</sup> January 2012 to discuss this objection.

Present for the hearing were:

### **Electrofix Energy Ltd**

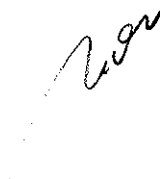
|                     |                      |
|---------------------|----------------------|
| Dr Adrian Delia     | Legal Representative |
| Not. Matthew Parnis | Legal Representative |
| Mr Joseph Schembri  | Representative       |
| Ms Deborah Schembri | Representative       |

### **Ministry for Gozo**

|                            |                      |
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| Dr Tatiane Scicluna Cassar | Legal Representative |
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### **Evaluation Board**

|                     |           |
|---------------------|-----------|
| Mr Mario Camilleri  | Chairman  |
| Ing. Jeffrey Muscat | Member    |
| Ing. Joe Portelli   | Member    |
| Perit Alex Bigeni   | Member    |
| Mr Philip Mifsud    | Secretary |



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

Dr Adrian Delia, legal advisor of Electrofix Energy Ltd, the appellant company, made the following submissions:

- i. he drew the attention of the Public Contracts Review Board that the letter of rejection had reached his client's representative the day before the lapse of the period within which he had the right to lodge an appeal and that it was forwarded to him after having requested it himself when he learned that the tender was being cancelled;
- ii. by letter dated 16<sup>th</sup> September 2011 the Contracts Department had informed his client that its offer had been found administratively non-compliant for the following reason:

*'The Evaluation Committee noted that the minimum value of projects completed did not meet the tender document requirements (as per section 6.1.2. Bullet 2)';*

- iii. cited clause 6.1.2 'Information about the tenderer's technical capacity':-

*'An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them.....'*

*This information must follow the form in Volume 1, Section 4 of the tender documents and include:*

*second bullet \* The minimum value of projects of a similar nature completed over the past three years shall be not less than €200,000 per annum.'*

- iv. with regard to the value of completed projects over three years his client had submitted the following :-


| a. Year | % of Works Completed | Total Amount<br>€ |
|---------|----------------------|-------------------|
| b. 2009 | 100%                 | 567,000           |
| c. 2010 | 100%                 | 774,000           |
| d. 2011 | 100%                 | 555,000           |

- v. since his client had submitted more than what was requested of him, he invited the contracting authority to explain its reason for rejection.

Dr Tatiane Scicluna Cassar, legal representative of the Ministry for Gozo, made the following submissions:-



- a. regarding the claim that the letter of rejection reached the appellant late, the dispatch of the said letter was not the responsibility of the adjudicating board but of the Contracts Department;
- b. in case the bidder was to rely on the resources of other entities, Clause 6.1.2 also stated, *inter alia*, that “*It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator*”. The appellant company’s representative produced no such undertaking;
- c. since the closing date of the tender was June 2011, with regard to the three year period requested, the adjudicating board considered two scenarios, namely calendar years 2009, 2010 and 2011 and a 12-month period scenario, i.e. July 2008 to June 2009, July 2009 to June 2010, July 2010 to June 2011, with the contracting authority taking the option that was more advantages to the bidder;
- d. there was no problem with regard to years 2010 and 2011 as the problem arose with regard to year 2009 in respect of which the appellant company – which submitted the bid in its own name and not as a joint venture/consortium - presented a contract worth €480,000 that it claimed to have carried out in Greece;
- e. clause 6.1.2 also provided that “*In so listing the end clients, the tenderer is giving his consent to the Evaluation Committee, so that the latter may, if it deems necessary, contact the relevant clients, with a view to obtain from them an opinion on the works provided to them, by the tenderer*”;
- f. the following information was extracted from emails exchanged between the appellant company and the adjudicating board – following Contracts Department’s approval - which information was therefore in the possession of the appellant company;
- g. by email dated 21<sup>st</sup> July 2011 the adjudicating board requested a certificate of satisfactory execution of the project carried out in Greece and the details of the overseas firm that commissioned that project;
- h. after requesting more time to reply, by emails dated 29<sup>th</sup> July and 24<sup>th</sup> August 2011 the appellant company replied that (a) *Nesi* was the end beneficiary of the project carried out in Greece, (b) the appellant company was only entrusted with the design and installation of the project which, in monetary terms, amounted to €64,000 and accounted for 70% of the whole project;
- i. the amount of €64,000 was confirmed once again by the appellant company in email dated 26<sup>th</sup> August 2011;
- j. it would, therefore, follow that if €64,000 accounted for 70% of the project then the total cost of the project carried out in Greece was worth €85,714 and not €480,000;



- k. when the adjudicating board worked out the value of the work actually carried out by the appellant company with regard to July 2008 and June 2009 it resulted that the total value of works carried out amounted to €134,000 or, if one considered 2009 as a calendar year, to €155,000 which were both short of the €200,000 stipulated in the tender document;

and

- l. email dated 27<sup>th</sup> July 2011 sent by the appellant company, presumably by mistake, to the adjudicating board but referring to a person by the name of 'Tasos' had raised certain doubts in the mind of the evaluators with regard to the contract executed in Greece.

The Chairman Public Contracts Review Board remarked that in order to evaluate the technical capacity of the bidder instead of requesting a fixed amount for each year of a 3-year period it would have been better to request an annual average over a 3-year period so that if in one year the bidder carried out, say €150,000 worth of works and during the other 2 years the said bidder carried out, say, €250,000 each year then one would not be penalised unnecessarily as one would have still proved one's technical capacity.

Mr Mario Camilleri, chairman of the adjudicating board, while appreciating the remark made by the Chairman Public Contracts Review Board, stressed that:-

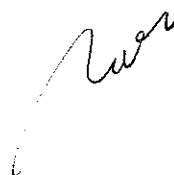
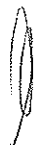
- a. the adjudicating board was bound to evaluate the bids according to the conditions and specifications laid down in the tender document;
- b. the evaluation board did not have any discretion to tolerate variations of any sort from requirements as, in this case, the clause stated "..... shall not be less than €200,000 per annum";

and

- c. the other bidder had been disqualified on the same grounds and one had also to keep in mind that other contractors might have participated in this tendering process had the conditions been different from those published.

Dr Delia argued that the amount of €200,000 in clause 6.1.2 referred to the minimum value of the projects and not to the value of the works invoiced per annum by the tenderer. He added that, in this case, his client presented a project worth €480,000 which satisfied the requirement of clause 6.1.2 and then his client went on to quantify the part of the project that the company had carried out.

Dr Scicluna Cassar disagreed with the appellant company's argument stating that in order to assess the technical capacity of the bidder the contracting authority had to consider only the works carried out by the appellant company – since the company tendered in its own name - and not by third parties. The contracting authority's legal advisor cited, as an extreme example, that



if a contractor supplied one bed for the Mater Dei Hospital that contractor could not attribute to himself the entire Mater Dei project.

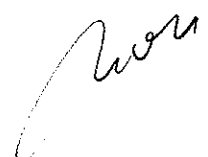
The Chairman Public Contracts Review Board expressed the view that the wording of bullet 2 of clause 6.1.2 might be interpreted in the following matter, namely, "*The minimum value of projects of a similar nature completed over the past three years shall be not less than €200,000 per annum*" ... might refer to the total value of the project/s, whereas ... "*In so listing the end clients, the tenderer is giving his consent to the Evaluation Committee, so that the latter may, if it deems necessary, contact the relevant clients, with a view to obtain from them an opinion on the works provided to them, by the tenderer*" ... might refer to the value of works actually carried out by the bidder.

Dr Scicluna Cassar stated that one could argue on end and perhaps even agree that the conditions could have been worded differently, however, in the case under examination, the tender conditions were quite clear and that the adjudicating board had acted correctly and judiciously throughout the process, even in verifying the amount of works carried out indicated by the appellant company.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant company, in terms of the reasoned letter of objection dated 26<sup>th</sup> September 2011 and through the verbal submissions made during the hearing held on the 18<sup>th</sup> January 2012, had objected against the decisions of the Department of Contracts to disqualify its offer as administratively non-compliant and to recommend the cancellation of the call for tenders;
- having noted the appellant firm's representatives' claims and observations regarding the fact that (a) the letter of rejection had reached his client's representative the day before the lapse of the period within which he had the right to lodge an appeal and that it was forwarded to him after having requested it himself when he learned that the tender was being cancelled, (b) by letter dated 16<sup>th</sup> September 2011 the Contracts Department had informed the appellant company that its offer had been found administratively non-compliant due to the fact "*that the minimum value of projects completed did not meet the tender document requirements (as per section 6.1.2. Bullet 2)*", (c) the amount of €200,000 in clause 6.1.2 referred to the minimum value of the projects and not to the value of the works invoiced per annum by the tenderer and (d) this case presented a project worth €480,000 which satisfied the requirement of clause 6.1.2 with the appellant company proceeding to quantify the part of the project that the company had carried out;
- having considered the contracting authority's representative's submissions, namely that (a) regarding the claim that the letter of rejection reached the appellant late, the dispatch of the said letter was not the responsibility of the adjudicating board but of the Contracts Department, (b) the adjudicating board was bound to evaluate the bids according to the conditions and specifications laid down in the tender document, (c) the evaluation board did



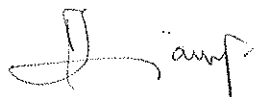
not have any discretion to tolerate variations of any sort from requirements as, in this case, the clause stated “..... shall not be less than €200,000 per annum”, (d) albeit in case the bidder was to rely on the resources of other entities, Clause 6.1.2 also stated, *inter alia*, that it “*must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator*”, the appellant company’s representative produced no such undertaking, (e) since the closing date of the tender was June 2011, with regard to the three year period requested, the adjudicating board considered two scenarios, namely calendar years 2009, 2010 and 2011 and a 12-month period scenario, i.e. July 2008 to June 2009, July 2009 to June 2010, July 2010 to June 2011, with the contracting authority taking the option that was more advantages to the bidder, (f) there was no problem with regard to years 2010 and 2011 as the problem arose with regard to year 2009 in respect of which the appellant company – which submitted the bid in its own name and not as a joint venture/consortium - presented a contract worth €480,000 that it claimed to have carried out in Greece, (g) by email dated 21<sup>st</sup> July 2011 the adjudicating board requested a certificate of satisfactory execution of the project carried out in Greece and the details of the overseas firm that commissioned that project, (h) after requesting more time to reply, by emails dated 29<sup>th</sup> July and 24<sup>th</sup> August 2011 the appellant company replied that (1) *Nesi* was the end beneficiary of the project carried out in Greece, (2) the appellant company was only entrusted with the design and installation of the project which, in monetary terms, amounted to €64,000 and accounted for 70% of the whole project, (i) the amount of €64,000 was confirmed once again by the appellant company in email dated 26<sup>th</sup> August 2011, (j) it would, therefore, follow that if €64,000 accounted for 70% of the project then the total cost of the project carried out in Greece was worth €85,714 and not €480,000, (k) when the adjudicating board worked out the value of the work actually carried out by the appellant company with regard to July 2008 and June 2009 it resulted that the total value of works carried out amounted to €134,000 or, if one considered 2009 as a calendar year, to €155,000 which were both short of the €200,000 stipulated in the tender document, (l) the other bidder had been disqualified on the same grounds and one had also to keep in mind that other contractors might have participated in this tendering process had the conditions been different from those published, (m) it disagreed with the appellant company’s argument stating that in order to assess the technical capacity of the bidder the contracting authority had to consider only the works carried out by the appellant company – since the company tendered in its own name - and not by third parties and (n) one could argue on end and perhaps even agree that the conditions could have been worded differently, however, in the case under examination, the tender conditions were quite clear and that the adjudicating board had acted correctly and judiciously throughout the process, even in verifying the amount of works carried out indicated by the appellant company,

reached the following conclusions:

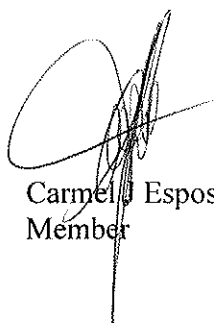
1. The Public Contracts Review Board argues that the amount of €200,000 in clause 6.1.2 referred to the minimum value of the projects and not to the value of the works invoiced per annum by the tenderer.

2. The Public Contracts Review Board considers the amount of €200,000 as an estimated benchmark and not, in any way, established by way of a scientific formula. As a matter of fact this Board remarks that, in order to evaluate the technical capacity of the bidder, instead of requesting a fixed amount for each year of a 3-year period it would have been better for one to request an annual average over a 3-year period so that if in one year the bidder carried out, say €150,000 worth of works and during the other 2 years the said bidder carried out, say, €250,000 each year then one would not be penalised unnecessarily as one would have still proved one's technical capacity. In this particular instance, regardless of the real amount of work carried out by the appellant company on the Greek project, yet the fact that the evaluation board stated during the hearing that there was no problem with regard to years 2010 and 2011 as the problem only arose with regard to year 2009 wherein the appellant company presented contracted value reaching €155,000, namely slightly less than €200,000, cannot but corroborate this Board's thesis that, in similar circumstances, a more pragmatic approach is desirable with 'substance' taking a more central stage when compared to 'form'.
3. The Public Contracts Review Board feels that, following a thorough deliberation on the fact that (a) the other bidder had been disqualified on the same grounds and (b) one had also to keep in mind that other contractors might have participated in this tendering process had the conditions been different from those published, this Board opines that with regards to (a) everyone has a right to appeal and the failure to do so remains the sole subjective conclusion reached by any participant but, definitely, not an issue upon which any of the contracting authorities, department of contracts or the public contracts review board has any discretionary powers and (b) this Board feels that it may well have been the case that other contractors might have participated in this tendering process had the conditions been different from those published, yet the Public Contracts Review Board maintains its stand that, in this particular instance, 'substance' had to prevail over 'form' as one cannot be expected to be excluded when, over a three year time frame, project works embarked upon amounted to more than the value of projects required by the contracting authority.

In view of the above this Board finds in favour of the appellant company and, apart from recommending that the appellant company's bid be reintegrated in the adjudication process, this Board also recommends that the deposit paid by the latter should be reimbursed.



Alfred R Triganza  
Chairman



Carmelo Esposito  
Member



Joseph Croker  
Member

30 January 2012