

PUBLIC CONTRACTS REVIEW BOARD

Case No. 448

CT/3089/2011; Adv. No. CT/221/2011

Tender for the Restoration of Birgu Landfront Fortifications – BRG 09

This call for tenders was published in the Government Gazette on the 12th December 2011. The closing date for this call with an estimated budget of € 733,606.85 (incl. VAT) was the 7th February 2012.

Six (6) tenderers submitted their offers.

MC Restauri di Miloro Corrada filed an objection on the 14th May 2012 against the decision taken by the Ministry for Resources and Rural Affairs to disqualify its offer for not being financially compliant and to recommend award of the tender to Agius Stone Works Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Carmel Esposito and Mr Paul Mifsud as members convened a public hearing on Monday, 13th August 2012 to discuss this objection.

Present for the hearing were:

MC Restauri di Miloro Carrada

Dr Peter Fenech	Legal Representative
Architect Mariella Xuereb	Representative
Ms Corradina Miloro	Representative

Agius Stone Works Ltd

Dr Paul Gonzi	Legal Representative
Mr Rosario Agius	Representative
Mr Nyal Xuereb	Representative

Ministry for Resources and Rural Affairs

Dr Victoria Scerri	Legal Representative
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Evaluation Board

Architect Chanelle Busuttil	Chairperson
Architect Mario Ellul	Member
Mr Mark Azzopardi	Member



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

Dr Peter Fenech, legal representative of MC Restauri di Miloro Corrada, the appellant company, stated that by letter dated 4th May 2012 the contracting authority had informed his client that its tender was disqualified for being financially non-compliant for the following reasons:

A) THE TOTAL AMOUNT QUOTED IN THE BILL OF QUANTITIES (BoQ) DIFFERED FROM THE TOTAL QUOTED IN THE TENDER FORM.

Dr Fenech submitted that the price of €514,600 quoted in the Bill of Quantities (BoQ) was already inclusive of VAT and what inadvertently happened was that in the amount quoted in the 'Tender Form' his client included once again the VAT element - on the total amount quoted in the BoQ - such that the amount indicated in the 'Tender Form' read €607,228, namely €514,600 plus €92,628 VAT. He added that the evaluation board noted that genuine mistake and effected the necessary adjustment.

Architect Chanelle Busuttill, chairperson of the evaluation board, remarked that, albeit with regard to the price, the appellant company was correct in its statement that there was a discrepancy between the price quoted in the BoQ and the price inserted in the 'Tender Form', yet, on arithmetically checking the price, the contracting authority noted that the VAT element was included twice and, as a consequence, the contracting authority took into account the correct price in its considerations.

B) DESCRIPTION OF ITEMS 71.010 AND 71.011 PAGE 202 OF BOQ AMENDED BY THE BIDDER

Dr Fenech submitted that, regarding the claim by the evaluation board that his client had altered the description of items 71.010 and 71.011 on page 202 of the tender document, it was quite evident that the 160 sq.m and 20 sq.m included in the respective description were identical to the 'Qty' and 'Unit' provided in the BoQ and that it was a mere copy-and-paste error which did not change the substance of the meaning of the two items in any way.

Architect Busuttill explained that:-

- i. whilst the contracting authority furnished bidders with a PDF version of the tender document so that the bidder would not alter its contents, yet the appellant company opted to reproduce the Bill of Quantity into an excel worksheet and, when effecting the conversion, certain errors were likely to occur;

and



- ii. the consequent alteration of the description of items 71.010 and 71.011 could be interpreted in a way that the rate quoted by the appellant company was limited to only 160 sq.m and 20 sq.m respectively and that a different rate could apply beyond those quantities.

C) ITEM NUMBERS FROM ITEM 107.000 ONWARDS HAD ALSO BEEN ALTERED BY THE BIDDER

Dr Fenech submitted that:-

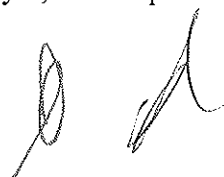
- a. his client had repeated item numbers of 107.000, 108.000 and 109.000 twice in its Bill of Quantity and, as a result, altered the item numbers from that point onwards;
 - b. this was brought about by the fact that it reproduced the bill of quantities provided in the tender document in an excel spreadsheet and, in so doing, it repeated item numbers 107.000 108.000 and 109.000;
 - c. what mattered was that, in fact, there were no missing items and there were no changes to the item descriptions in the BoQ provided;
- and
- d. the first version of the BoQ provided by the Department of Contracts/ Ministry for Resources and Rural Affairs was riddled with item numbering mistakes such that a clarification was issued to replace the original BoQ.

Architect Busuttill agreed that whilst, in all probability, an error was committed when converting the PDF file into an excel worksheet, yet the bidder did not have to effect such a conversion because it could have simply filled in by hand the rates and prices in the Bill of Quantity provided in the tender document as the other bidders did. She added that one had to appreciate that, besides altering the tender document, erroneous item numbers affected also the cross references contained in the tender document.

D) RATES PER CITED ITEMS WERE MISSING AND THEREFORE THE FINANCIAL BID WAS INCOMPLETE

Dr Fenech submitted that:-

- i. when filling in the Bill of Quantity his client considered that some of the items/prices were already included with other rates/prices quoted in the same Bill of Quantity and, therefore, in the corresponding space provided under the column 'Rate', his client either inserted a '0' or left the space blank as the company's intention was to offer these particular works 'free of charge';
- ii. whilst the evaluation board considered the '0' rates and the rates which were left blank as missing information, yet, it was quite clear that the totals in



each page of the Bill of Quantity added up correctly and corresponded to the end total of the Bill of Quantity which, in turn, tallied with the total in the 'Tender Form' except for the double VAT content;

- iii. it was therefore clear that the tenderer was going to execute free of charge the works against which his client indicated a 'zero' rate or left the rate blank;
- iv. sub-clause 17.1 of the tender document stated that "*the tender price must cover the whole of the works as described in the tender documents*" and sub-clauses 17.3 and 17.7 of the tender document indicated that the financial offer was considered as the total financial cost to the contracting authority;
- v. the evaluation board could have asked for a confirmation that the rates left blank represented a 'zero' rate because clause 29 of the tender document provided the evaluation committee with the discretion to ask the tenderer to clarify any aspect of the tender, provided that the price and content of the tender were not altered;

and

- vi. although section III at page 128 of the tender document concerning 'Pricing' stated that:

'Rates and prices must be entered against each item in the bill of quantities'

yet, that referred to the rates/prices that were going to be charged to the contracting authority and not to rates/prices which were included in other items or offered free of charge.

Architect Busuttil explained that:-

- a. this was the most substantial of the four reasons of non-compliance and it had nothing to do with any cut-and-paste or file conversion errors;
- b. there were some items (*circa* 20) against which a '0' rate was quoted and there were some other items (*circa* 6) against which the rate was left blank;
- c. the contracting authority could not assume that the rate left blank represented a '0' rate all the more when (1) in other instances, the bidder did indicate a '0' rate and (2) during the execution of the contract the contractor could claim that the rate left blank was not a '0' rate but that that was only the interpretation of the contracting authority;
- d. the logical conclusion of the evaluation board was that where the bidder indicated a '0' rate or left the rate blank it meant that the bidder was not going to carry out those particular works;

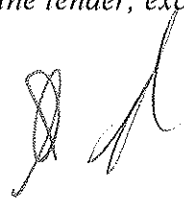
- e. with regard to clarifications/rectifications clause 16.1 note No. 3 of the tender document the bill of quantities featured as (iii) under (f) 'Financial Offer/Bill of Quantities' stated that "*No rectification shall be allowed. Only clarifications on the submitted information may be requested*";
 - f. if the appellant company was allowed to insert a '0' rate or, for that matter, any other rate in the rate spaces left blank, that would have amounted to a rectification which clause 16.1 did not allow with regard to the Bill of Quantities;
- and
- g. it was not possible for the evaluation board to extrapolate the '0' and 'blank' rates/prices from the other quoted rates/prices so as to ascertain that all works indicated in the Bill of Quantity were covered by the price quoted.

Dr Victoria Scerri, legal representative of the contracting authority, submitted that:-

- i. the rate of the following items had been entered as '0' rate: 2.007, 2.014-2.018, 2.012 - 2.022, 13.002, 13.004, 19.001, 30.004, 35.001, 46.004, 51.001, 62.002, 66.001, 77.002, 77.004, 82.001, 96.001, 107.002, 122.001 (119.001), 148.001 (145.001) 144.002 (141.002) 150.009 (147.009) 150.009 (147.009), 150.011 (147.011) - items in brackets refer to the erroneous item numbers quoted by the appellant company;
 - ii.....on the other hand, the appellant company inserted no rate for items 2.002, 2.011, 2.012, 71.007 and 146.001;
 - iii. the 'Preamble' to the section headed 'Bill of Quantities' in Volume 4 'Financial Bid' in the tender document stated that:

'Tenderers must price each item in the bill of quantities separately and follow the instructions regarding the transfer of various totals in the summary'.
 - iv. the interpretation given by the appellant company that the bidder had to quote rates only in respect of items that the bidder was going to perform against a charge was not correct because the bidder had been requested to tender for the whole works and that, in this instance, one should have quoted a rate for each and every item;
- and
- v. it was neither prudent nor acceptable to make assumptions when dealing with rates/prices.

Dr Fenech reiterated that clause 29 entitled the evaluation board to "*ask a tenderer to clarify any aspect of his tender.... They (such requests) may in no circumstance alter or try to change the price or content of the tender, except to correct*



arithmetical errors discovered by the evaluation board when analysing tenders, in accordance with clause 31.” He added that his client would have just confirmed the ‘0’ rates and that the rates left blank also represented a ‘0’ rate thus leaving the page totals and final total of the BoQ intact with, effectively, no alteration to the price of the tender but just confirming the stated price.

The Chairman Public Contracts Review Board remarked that:-

- a. what one had to deliberate upon was whether the evaluation board could have asked the appellant company about the rates left blank and whether the appellant company’s interpretation that the blank rates should read a ‘0’ rate would have amounted to a clarification or to a rectification of the BoQ for the purposes of Note 3 at clause 16.1;

and

- b. whilst it was the responsibility of the contracting authority to publish a clear and correct tender document, yet, by the same measure, it was the responsibility of the bidder to submit a clear and complete tender submission.

Dr Paul Gonzi, legal representative of the recommended tenderer, shared the arguments made by the contracting authority and further submitted that:-

- a. clause 31 stipulated that arithmetical errors could be corrected only in the case of a discrepancy between the amounts in figures and the amounts in words and that the unit price should prevail over an error in the total price derived from a multiplication of the rate and the quantity;
- b. albeit clause 29 granted the evaluation board a broad discretion through the usage of the word ‘may’ to clarify any aspect of the tender, yet, such clarifications could only be made in line with specific instructions / limitations as laid down in sub-clause 16.1 – repeated at sub-clause 1.1 - and clause 31;
- c. sub-clause 1.1 also made it clear that, with regard to the tender document *“any disagreement, contradiction, alteration or deviation shall lead to the tender offer not being considered any further”*;

and

- d. there were various decisions of the Public Contracts Appeals Board / Public Contracts Review Board whereby no rectification was allowed of omissions of mandatory documentation/information and/or of alterations of tender documentation such as the tender form or BoQ.

Dr Fenech pointed out that (1) this case did not involve arithmetical errors or tempering with the tender document but that the rates/prices omitted were already included in other items of the same BoQ and (2) the cut-and-paste errors emerged on converting the BoQ from PDF to excel. He concluded that such minor



mistakes on the part of his client did not warrant the company to be disqualified from the tendering process.

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 the 14th May 2012 and also through their verbal submissions presented during the hearing held on the 13th August 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 4th May 2012 the contracting authority had informed the appellant company that its tender was disqualified for being financially non-compliant, (b) the price of €514,600 quoted in the Bill of Quantities was already inclusive of VAT and what inadvertently happened was that in the amount quoted in the 'Tender Form' the said appellant company included once again the VAT element - on the total amount quoted in the Bill of Quantities - such that the amount indicated in the 'Tender Form' read €607,228, namely €514,600 plus €92,628 VAT - with the evaluation board noting the genuine mistake so much so that it effected the necessary adjustment, (c) regarding the claim by the evaluation board that the appellant company had altered the description of items 71.010 and 71.011 on page 202 of the tender document, it was quite evident that the 160 sq.m and 20 sq.m included in the respective description were identical to the 'Qty' and 'Unit' provided in the Bill of Quantities and that it was a mere copy-and-paste error which did not change the substance of the meaning of the two items in any way, (d) the appellant company had repeated item numbers of 107.000, 108.000 and 109.000 twice in its Bill of Quantities and, as a result, altered the item numbers from that point onwards, (e) the error committed by the appellant company with regard to the repetition of particular item numbers was brought about by the fact that it reproduced the bill of quantities provided in the tender document in an excel spread sheet and, in so doing, it repeated item numbers 107.000 108.000 and 109.000, (f) what mattered was that, in fact, there were no missing items and there were no changes to the item descriptions in the Bill of Quantities provided, (g) the first version of the Bill of Quantities provided by the Department of Contracts / Ministry for Resources and Rural Affairs was riddled with item numbering mistakes such that a clarification was issued to replace the original Bill of Quantities, (h) when filling in the Bill of Quantities the appellant company considered that some of the items/prices were already included with other rates/prices quoted in the same Bill of Quantities and, as a consequence, in the corresponding space provided under the column 'Rate', the appellant company either inserted a '0' or left the space blank as the company's intention was to offer these particular works 'free of charge', (i) whilst the evaluation board considered the '0' rates and the rates which were left blank as missing information, yet, it was quite clear that the totals in each page of the Bill of Quantities added up correctly and corresponded to the end total of the Bill of Quantities which, in turn, tallied with the total in the 'Tender Form' except for the double VAT content, (j) it was therefore clear that the tenderer was going to



execute free of charge the works against which the appellant company indicated a 'zero' rate or left the rate blank, (k) sub-clause 17.1 of the tender document stated that "*the tender price must cover the whole of the works as described in the tender documents*" and sub-clauses 17.3 and 17.7 of the tender document indicated that the financial offer was considered as the total financial cost to the contracting authority, (l) the evaluation board could have asked for a confirmation that the rates left blank represented a 'zero' rate because clause 29 of the tender document provided the evaluation committee with the discretion to ask the tenderer to clarify any aspect of the tender, provided that the price and content of the tender were not altered, (m) although section III at page 128 of the tender document concerning 'Pricing' stated that 'Rates and prices must be entered against each item in the bill of quantities', yet, that referred to the rates/prices that were going to be charged to the contracting authority and not to rates/prices which were included in other items or offered free of charge and (n) clause 29 entitled the evaluation board to "*ask a tenderer to clarify any aspect of his tender.... They (such requests) may in no circumstance alter or try to change the price or content of the tender, except to correct arithmetical errors discovered by the evaluation board when analysing tenders, in accordance with clause 31.*" and that the appellant company would have just confirmed the '0' rates and that the rates left blank also represented a '0' rate thus leaving the page totals and final total of the Bill of Quantities intact with, effectively, no alteration to the price of the tender but just confirming the stated price;

- having considered the contracting authority's representative's reference to the fact that (a) albeit with regard to the price, the appellant company was correct in its statement that there was a discrepancy between the price quoted in the Bill of Quantities and the price inserted in the 'Tender Form', yet, on arithmetically checking the price, the contracting authority noted that the VAT element was included twice and, as a consequence, the contracting authority took into account the correct price in its considerations, (b) whilst the contracting authority furnished bidders with a PDF version of the tender document so that the bidder would not alter its contents, yet the appellant company opted to reproduce the Bill of Quantities into an excel worksheet and, when effecting the conversion, certain errors were likely to occur, (c) the consequent alteration of the description of items 71.010 and 71.011 could be interpreted in a way that the rate quoted by the appellant company was limited to only 160 sq.m and 20 sq.m respectively and that a different rate could apply beyond those quantities, (d) that whilst, in all probability, an error was committed when converting the PDF file into an excel worksheet, yet the bidder did not have to effect such a conversion because it could have simply filled in by hand the rates and prices in the Bill of Quantities provided in the tender document as the other bidders did, (e) one had to appreciate that, besides altering the tender document, erroneous item numbers affected also the cross references contained in the tender document with this being considered as the most substantial of the four reasons of non-compliance and it had nothing to do with any cut-and-paste or file conversion errors, (f) there were some items (*circa* 20) against which a '0' rate was quoted and there were some other items (*circa* 6) against which the rate was left blank, (g) the contracting authority could not assume that the rate left blank represented a '0' rate all the more when (1) in other instances, the bidder did indicate a '0' rate and (2)



during the execution of the contract the contractor could claim that the rate left blank was not a '0' rate but that that was only the interpretation of the contracting authority, (h) the logical conclusion of the evaluation board was that where the bidder indicated a '0' rate or left the rate blank it meant that the bidder was not going to carry out those particular works, (i) with regard to clarifications/rectifications clause 16.1 note No. 3 of the tender document the bill of quantities featured as (iii) under (f) 'Financial Offer/Bill of Quantities' stated that "*No rectification shall be allowed. Only clarifications on the submitted information may be requested*", (j) if the appellant company was allowed to insert a '0' rate or, for that matter, any other rate in the rate spaces left blank, that would have amounted to a rectification which clause 16.1 did not allow with regard to the Bill of Quantities, (k) it was not possible for the evaluation board to extrapolate the '0' and 'blank' rates/prices from the other quoted rates/prices so as to ascertain that all works indicated in the Bill of Quantities were covered by the price quoted, (l) the rate of the following items had been entered as '0' rate: 2.007, 2.014- 2.018, 2.012 - 2.022, 13.002, 13.004, 19.001, 30.004, 35.001, 46.004, 51.001, 62.002, 66.001, 77.002, 77.004, 82.001, 96.001, 107.002, 122.001 (119.001), 148.001 (145.001) 144.002 (141.002) 150.009 (147.009) 150.009 (147.009), 150.011 (147.011) - items in brackets refer to the erroneous item numbers quoted by the appellant company, (m) on the other hand, the appellant company inserted no rate for items 2.002, 2.011, 2.012, 71.007 and 146.001, (n) the 'Preamble' to the section headed 'Bill of Quantities' in Volume 4 'Financial Bid' in the tender document stated that '*Tenderers must price each item in the bill of quantities separately and follow the instructions regarding the transfer of various totals in the summary*', (o) the interpretation given by the appellant company that the bidder had to quote rates only in respect of items that the bidder was going to perform against a charge was not correct because the bidder had been requested to tender for the whole works and that, in this instance, one should have quoted a rate for each and every item and (p) it was neither prudent nor acceptable to make assumptions when dealing with rates/prices;

- having also considered the recommended tenderer's representative's reference to the fact that (a) clause 31 stipulated that arithmetical errors could be corrected only in the case of a discrepancy between the amounts in figures and the amounts in words and that the unit price should prevail over an error in the total price derived from a multiplication of the rate and the quantity, (b) albeit clause 29 granted the evaluation board a broad discretion through the usage of the word 'may' to clarify any aspect of the tender, yet, such clarifications could only be made in line with specific instructions / limitations as laid down in sub-clause 16.1 – repeated at sub-clause 1.1 - and clause 31, (c) sub-clause 1.1 also made it clear that, with regard to the tender document "*any disagreement, contradiction, alteration or deviation shall lead to the tender offer not being considered any further*" and (d) there were various decisions of the Public Contracts Appeals Board / Public Contracts Review Board whereby no rectification was allowed of omissions of mandatory documentation / information and / or of alterations of tender documentation such as the tender form or Bill of Quantities;

reached the following conclusions, namely:



1. The Public Contracts Review Board argues that the contracting authority was correct in claiming that the total amount quoted by the appellant company in the Bill of Quantity differed from the total quoted in the 'Tender Form'.
2. This Board also contends that it is evidently clear that the contracting authority was correct when it stated that the description of items 71.010 and 71.011 page 202 of the Bill of Quantity was amended by the bidder. This Board feels that, regardless of the claim made by the appellant company that that it was a mere copy-and-paste error, no one can deny that this happened despite the fact that the contracting authority did furnish bidders with a PDF version of the tender document so that the bidder would not alter its contents. The Public Contracts Review Board feels that the appellant company had no right to reproduce the Bill of Quantity into an excel worksheet and then expect an evaluation board to (a) either clarify something which should not have been presented in that format in the first place rendering the said document as, partially, substantially, different or (b) more so, rectify any part of the document submitted. This Board acknowledges the fact that an evaluation board's remit is to analyse and decide and not to try to interpret and, possibly, clarify what is not visibly clear where clarifications are not allowed.
3. The Public Contracts Review Board considers the appellant company's admission that it had – through its own arbitrary decision to reproduce the bill of quantities provided in the tender document in an excel spread sheet - erroneously, repeated item numbers of 107.000, 108.000 and 109.000 twice in its Bill of Quantity and that, as a result, it ended up altering the item numbers from that point onwards, as well as affecting the cross references contained in the tender document, as a good enough reason for the evaluation board to adversely consider the content of the document as submitted by the appellant company. It is a fact that, in this context, a bidder did not have to effect such a conversion because a participating tenderer could have simply filled in by hand the rates and prices in the Bill of Quantity provided in the tender document as, ultimately, all the other bidders did.
4. The Public Contracts Review Board establishes that, once again, with regard to the fact that the evaluation board had argued that the rates as the items cited were missing thus rendering the financial bid as incomplete, agrees with the evaluation board when the latter claims that this omission had nothing to do with any cut-and-paste or file conversion errors. Also, one cannot but agree with the evaluation board when the latter claims that it is a fact that, in the appellant company's bid, (1) there were some items (*circa* 20) against which a '0' rate was quoted and there were some other items (*circa* 6) against which the rate was left blank and (2) the contracting authority could not assume that the rate left blank represented a '0' rate all the more when, in other instances, the bidder did indicate a '0' rate. This Board places major emphasis on the fact that the role of an evaluation board is not to *assume* but to, inter alia, *analyse* and *deliberate* on facts submitted by a participating tenderer.
5. With regard to clarifications/rectifications the Public Contracts Review Board acknowledges the fact that in clause 16.1 note No. 3 of the tender document the bill of quantities featured as (iii) under (f) 'Financial Offer/Bill of

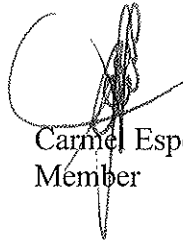
Quantities' stated that *"No rectification shall be allowed. Only clarifications on the submitted information may be requested"*. Undoubtedly, in view of this, this Board concurs with the point raised by the evaluation board's representative wherein it was argued that if the appellant company was allowed to insert a '0' rate or, for that matter, any other rate in the rate spaces left blank, that would have amounted to a rectification.

6. This Board contends that in a tendering procedure, whilst it is the responsibility of the contracting authority to publish a clear and correct tender document, yet, by the same measure, it is the responsibility of a bidder to submit a clear and complete tender submission.

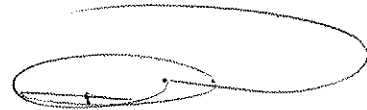
In view of the above, this Board finds against the appellant company and recommends that the deposit paid by the same appellant company for the appeal to be lodged should not be reimbursed.



Alfred R Triganza
Chairman



Carmel Esposito
Member



Paul Mifsud
Member

10th September 2012