

PUBLIC CONTRACTS REVIEW BOARD

Case No. 557

DH/1093/2012

Tender for Electrical Works at Rabat Health Centre

This call for tenders was published in the Government Gazette on the 2nd November 2012. The closing date for this call with an estimated budget of €93,203.14 (excl. VAT) was the 5th December 2012.

Six (6) tenderers submitted their offers.

Solutions & Infrastructure Services Ltd filed an objection on the 26th April 2013 against the decisions of the Ministry for Health to discard its offer and to recommend the award of the tender to EPM Solutions Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Monday, 27th May 2013 to discuss this objection.

Present for the hearing were:

Solutions & Infrastructure Services Ltd

Ing. Jesmond Zammit	Chief Operating Officer
Ing. Joseph Caruana	Representative

EPM Solutions Ltd

Mr Dione Zahra	Representative
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Ministry for Health

Ms Stephanie Abela	Representative
Ing. Paul Vassallo	Adviser

Evaluation Board

Mr Charlot Muscat	Chairman
Mr Mario Attard	Member
Ms Marie Louise Grech	Member
Ms Rita Turchett	Secretary

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

Ing. Jesmond Zammit, representing Solutions & Infrastructure Services Ltd, the appellant company, made the following submissions:-

- i. by email dated 22nd April 2013 the contracting authority informed the appellant company that its offer was not accepted "*since the statement of compliance with the technical specifications (Volume 3) was not submitted as requested in clause 16 (e) (ii) of the Instructions to Tenderers*";
 - ii. whilst, admittedly, the statement of compliance had not been presented with the original tender submission through an oversight, yet this statement only requested the bidding company to declare that its tender submission was according to tender specifications;
 - iii. the offer was technically compliant and there was no need to highlight any non-compliance issues or anything abnormal and, as a result, (1) the submission of the 'statement of compliance' with the technical specifications was not necessary apart from the fact that (2) the adjudicating board could have verified compliance from the product literature and the other documentation presented with the tender submission;
- and
- iv. a simple request for clarification would have settled the matter as the appellant company would have readily provided this 'statement of compliance' which, basically, confirmed that the tender submission was according or even exceeded the published tender specifications.

Mr Charlot Muscat, chairman of the evaluation board, remarked that the 'Statement of Compliance with the Technical Specifications (Volume 3)' featured in clause 16.1 (e) (ii) of the tender document in respect of which Note 3 to clause 16.1 applied, which read:

'No rectification shall be allowed. Only clarifications on the submitted information may be requested.'

Ing. Paul Vassallo, adviser to the evaluation board, explained that:-

- a. although the tender submission could be compliant with tender specifications instances might arise when working on site that the contractor would have to adjust things according to the prevailing conditions on site;
- b. such a blanket statement as the 'Statement of Compliance' was required by the contracting authority and it could add costs to the contractor;

and

- c. the appellant company's tender submission had not been evaluated technically because it was disqualified as soon as this compliance statement was discovered missing.

Ms Stephanie Abela, also representing the contracting authority, remarked that the appellant company was not disqualified due to administrative non-compliance otherwise the contracting authority would have been allowed to seek a clarification and/or rectification as per Note 2 to clause 16.1 but the appellant company was disqualified due to a technical shortcoming because the 'Statement of Compliance' represented a technical specification under clause 16.1 (e) (ii) in respect to which Note 3 was applicable.

Mr Dione Zahra, a representative of the recommended tenderer, remarked that one had to keep in mind that the appellant company's tender submission had not yet been technically evaluated and that in the statement of compliance the bidder was obliged to point out any variations from published specifications and any minor changes had to be approved by the client.

At this point the hearing came to a close.

This Board,

- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated 24th April 2013 and also through its representatives verbal submissions presented during the hearing held on the 27th May 2013, 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 email dated 22nd April 2013 the contracting authority informed the appellant company that its offer was not accepted "*since the statement of compliance with the technical specifications (Volume 3) was not submitted as requested in clause 16 (e) (ii) of the Instructions to Tenderers*", (b) whilst, admittedly, the statement of compliance had not been presented with the original tender submission through an oversight, yet this statement only requested the bidding company to declare that its tender submission was according to tender specifications, (c) the offer was technically compliant and there was no need to highlight any non-compliance issues or anything abnormal and, as a result, (1) the submission of the 'statement of compliance' with the technical specifications was not necessary apart from the fact that (2) the adjudicating board could have verified compliance from the product literature and the other documentation presented with the tender submission and (d) a simple request for clarification would have settled the matter as the appellant company would have readily provided this 'statement of compliance' which, basically, confirmed that the tender submission was according or even exceeded the published tender specifications;
- having considered the contracting authority's reference to the fact that (a) the 'Statement of Compliance with the Technical Specifications (Volume 3)' featured in clause 16.1 (e) (ii) of the tender document in respect of which Note 3 to clause 16.1 applied, which read '*No rectification shall be allowed. Only clarifications on*

the submitted information may be requested', (b) although the tender submission could be compliant with tender specifications, instances might arise when working on site that the contractor would have to adjust things according to the prevailing conditions on site, (c) such a blanket statement as the 'Statement of Compliance' was required by the contracting authority and it could add costs to the contractor, (d) the appellant company's tender submission had not been evaluated technically because it was disqualified as soon as this compliance statement was discovered missing and (e) the appellant company was not disqualified due to administrative non-compliance otherwise the contracting authority would have been allowed to seek a clarification and/or rectification as per Note 2 to clause 16.1 but the appellant company was disqualified due to a technical shortcoming because the 'Statement of Compliance' represented a technical specification under clause 16.1 (e) (ii) in respect to which Note 3 was applicable,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that a mandatory requirement, regardless of the importance given to it by a participating tenderer, cannot be seen as something which may be arbitrarily decided upon by the same tenderer as to whether one should provide whatever is requested or not. In similar circumstances there is no room for arbitrary decisions.
2. This Board feels that the adjudication board was correct in establishing that the appellant company was not disqualified due to administrative non-compliance otherwise the contracting authority would have been allowed to seek a clarification and/or rectification as per Note 2 to clause 16.1 but the appellant company was disqualified due to a technical shortcoming because the 'Statement of Compliance' represented a technical specification under clause 16.1 (e) (ii) in respect to which Note 3 was applicable.
3. This Public Contracts Review Board acknowledges that, in view of the above, the adjudicating board could not (a) verify compliance from the product literature and the other documentation presented with the tender submission and (b) seek any clarifications by requesting the tenderer (the appellant company) to provide the 'statement of compliance'.

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

Alfred R Triganza
Chairman

Joseph Croker
Member

Carmel Esposito
Member

31st May 2013