

PUBLIC CONTRACTS REVIEW BOARD

Case No. 560

MG 186/2010/Vol I

Tender for the Supply, Delivery, Installation, Commissioning, Operation (Maintenance) and Decommissioning of a Wind Monitoring System in Gozo.

The tender was published on the 5th June 2012 with a closing date of the 17th July 2012. The estimated value of the Tender was €120,000 (exclusive of VAT).

Two (2) bidders submitted their offers.

Gozo Wind Projects Joint Venture filed an objection on the 10th December 2012 against a decision of the Corporate Services Directorate, Ministry for Gozo to discard its offer and to recommend the cancellation of the Tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a meeting on Tuesday 9th July 2013 to discuss the appeal.

Present:

Gozo Wind Projects Joint Venture

Dr John L. Gauci	Legal Representative
Perit Shirley Buttigieg	Representative

Ministry for Gozo

Mr Anthony Zammit	Director
Dr Tonio Sant	Representative
Dr Mireille Sacco	Legal Representative

Evaluation Board

Eng. Therese Attard	Chaiperson
Mr Roberto Curmi	Member
Mr Anthony Formosa	Member
Ing. Joe Portelli	Mechanical Engineer

The Chairman made a brief introduction and the appellant company's representative was invited to explain the motives of the firm's objection.

Dr John L. Gauci, legal representative of the appellants, stated that his clients were disqualified because "the datalogger they offered only records samples every 10 minute interval", while specifications called for recording every minute, 10 minutes and 1 hour. The reasons for the objection were as follows:

That the contracting authority based its decision solely on the technical literature submitted with the bid. The evaluation board should have asked appellants for clarification whereupon it would have been explained that although the technical literature gave the 10 minute interval, this being the recognized standard interval according to the IEC61400 standard, the offered data logger could in fact be set to record at 1 minute, 10 minutes and 1 hour intervals.

The product offered by appellants conforms to the IEC61400 standard as requested in the tender. This standard states that recording should be every 10 minutes. The technical literature submitted by appellants with the bid had to be according to the IEC61400 standard and not for customized settings.

In a similar case, this point was decided upon by the PCRB (Case 469), where the then objector, had filed literature only according to the international standard. Applicants bid in the present tender, conformed to the requested standard and their bid, appellants declared that they were conforming also with all the other specifications. Thus it follows that the contracting authority was in duty bound to ask for clarification. Dr Gauci also quoted another judgement given by the Court of Appeal of the 10 July 2012 on another case decided by the PCRB, case 365, that once a bidder had offered specifications according to a requested Standard, the matter should never have been resolved by the disqualification of the bidder but by clarification.

Dr Mireille Sacco legal representative, Ministry for Gozo stated that appellants' bid was disqualified because the 1 second, 1 minute, 10 minutes and 1 hour intervals were mandatory. The evaluation board had to stick to mandatory specifications as otherwise it would be biased in favour of the appellants. Nowhere in appellants' bid did the information emerge that the equipment could give the required intervals. The bid states that "on request", could be set to give other results. No clarification was possible because as per 16.1.1 only clarification was possible not rectification, and to change the given 10 minute interval would amount to rectification.

Mr Anthony Zammit for the contracting authority explained the difficulty to differentiate between clarification and rectification. Additional information qualified as rectification. This was even checked by the evaluation board with the Department of Contracts. Appellants' bid had missing information as they did not include the requested time intervals with their bid. To ask them for this missing information would be accepting rectification. It was only here during the present hearing that the possibility of it providing 1 minute and 1 hour interval was given. The contracting authority had every right to ask for additional specifications that suited it best, even when requesting standard compliancy. Appellant could have qualified his

bid by including a letter or document that showed that the required interval sampling and recording would be made.

Chairman PCRB this point asked the appellant's representative if in fact their bid mentioned the different intervals. Dr Gauci insisted that his clients had declared they were binding themselves with the specifications and that contracting authority should have asked for clarification.

Mr Anthony Zammit stated that even had appellants provided the information now they submitted with their appeal, in the first instance, with their bid, it would still have not qualified because it states "or" instead of "and" when referring to the intervals of recording. The contracting authority required "and".

Dr John L. Gauci closed his case by reiterating that his clients had submitted only literature that conformed to the accepted standard and they had declared themselves to abide with all the other specifications, and had no need to do anything else. Thus the contracting authority should have asked for clarification.

The hearing was at this point closed.

This Board,

Having noted the reasoned letter of objection filed by the Appellant, dated 9th December 2012,

Having noted the Appellant's claims as follows:-

- a) **That the Contracting Authority based its final decision solely on the technical literature submitted with the bid. And that the equipment offered by the Appellant could be set to record also " every 1 hour interval"**
- b) **That the equipment offered by the Applicant was in conformity with IEC 61400 Standard.**
- c) **At no point in time did the Evaluation Board asked the Appellant for any clarifications.**
- d) **That in a similar case decided by the PCRB (Case 469) the Appellant filed literature according to International Standards ".Once a bidder had offered a product according to the required specifications he should have been asked for clarifications"**

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Having considered the Contracting Authority's submissions as follows:-,

- i. **That the clause stipulating the " interval periods of every 1 minute, 10 minutes and 1 hour" was mandatory.**
- ii. **That it was not possible for the Contracting Authority to ask or rather enquire for more details as this would result in a "rectification" and not a "clarification",**

Reaching the following conclusion,

- 1. The Public Contracts Review Board opines the Contracting Authority's Evaluation Board should have asked for any clarifications necessary during the Evaluation Process.**
- 2. Clarifications during the Evaluation Process do not entail rectification or addition to a Tender.**
- 3. The decision taken in the case No 469 on 29th October 2012 taken by PCRБ is hereby upheld.**
- 4. In view of the above, this Board finds in favour of the Appellant and recommends that:**
 - a. The deposit paid by the same appellant for the appeal to be lodged should be reimbursed.**
 - b. Furthermore, this Board recommends that the Evaluation Board should take remedial action to ensure that Appellant is integrated in the tendering process.**

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Richard A. Matrenza
Member

29th July 2013