

PUBLIC CONTRACTS REVIEW BOARD

Case No. 565

CT 2136/2012

Tender for the Supply, Delivery, Installation, Testing, Commissioning of Grid-connected Photovoltaic Systems at the Biosciences Building, Chemistry Building and Students House at the University of Malta, Msida.

The tender was published on the 6th July 2012 with a closing date of the 28th August 2012.

The estimated value of the Tender was €296,610.17 (Exclusive of VAT).

Fourteen (14) bidders submitted their offers.

On the 21st January 2013, Solar Solutions Limited filed an objection, followed by a reasoned letter of objection filed on the 28th January 2013 against a decision of the Director General (Department of Contracts) to the of award of tender to Solar Engineering Limited under Option 1 for the sum of €301,899 including VAT.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 16th July 2013 to discuss the appeal.

Present:

Solar Solutions Limited - Appellants

Dr Nicolai Vella Falzon	Legal Representative
Mr Jesmond Farrugia	Representative

Solar Engineering Limited – Recommended Bidder

Dr Mario Scerri	Legal Representative
Mr Anthony Saliba	Representative

University of Malta – Contracting Authority

Dr Oriella Degiovanni	Legal Representative
Mr Tonio Mallia	Chairman Evaluation Board
Mr Karm Saliba	Secretary
Prof. Joseph Micallef	Member Evaluation Board
Dr Edward Gatt	Member Evaluation Board
Dr Ivan Grech	Member Evaluation Board

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

Dr Nicolai Vella Falzon on behalf of the appellants stated that appellants have four grievances regarding the way this tender has been adjudicated. These grievances are related to the compliance of the recommended bidder.

1. Experience: Clause 6.1.2 (a) of the tender document at page 6 required that the manufacturer of the panels had at least fourteen (14) years experience in the manufacture of the said panels. Hence the manufacturer of the offered panels, S-Energy should have been manufacturing these panels for fourteen years. Preferred bidders themselves state that S-Energy, who manufactures their panels was set up in 2001, thus could not have the required fourteen years experience. They claimed that S-Energy was a spin-off of Samsung. Samsung however did not transfer its operations but if Samsung is still producing panels so it was not absorbed into S-Energy. A former Chief Executive Officer at Samsung's set up S-Energy. Although he would have had the necessary experience, the company he set up did not. The tender required the 14 years' experience to ensure that any panels acquired through it had been thoroughly tested, keeping in mind that these panels had a guaranteed life-span of twenty to twenty five years. Thus this condition, included in the tender to provide safeguards was not satisfied by the preferred bidders.
2. Optimizer: The second grievance relates to Clause 4.3 at page 50 of the Tender document, also corroborated at page 46 Volume 3. These show how the panels are to be fixed to a single inverter. The recommended tenders' bid refers to a power optimizer, and this goes beyond what was requested and constitutes a variant. Clause 21.1 at page 12 and Clarification letter of the 31st July 2012 both make it clear that no variant solutions would be admissible, and this requirement was mandatory. This optimizer was a variant solution and not additional equipment. Thus another mandatory requirement of the tender was not abided with.
3. Tolerance: Clause 4.1 of the Tender document, at page 48, required that the Power tolerance of the modules to be within +/- 5%, as a minimum, whereas the preferred bidders units have a power tolerance of +/- 3% which is less than 2% less than the required specifications.
4. Clause 4.1 at page 49 also requires that modules shall have an anodized aluminium frame with a coating. However information available to appellants state that the panel frames provided by S-Energy, while being anodized aluminium, do not have the required coating.

Dr Oriella Degiovanni, on behalf of the Contracting Authority dealt only on two legal points. The tender was not awarded because it was the cheapest. And that legally, although spin-off was in 2001, manufacture of the panels had started in 1994 by Samsung. Spin-off means continuance.

Chairman PCRB explained that he sees spin-off as the creation of another company within an established company to conduct part of the business of the main company. And a company that was incorporated in 2001 could only start production as from that date.

Professor Joseph Micallef for the University of Malta claimed that on the internet S-Energy advertises itself as being an internal division of Samsung and that it started operating in 1994 and that production was continuous. Contended that Samsung would have taken legal action

if it was not so. He could not state if Samsung was the shareholder of S-Energy.

Dr Mario Scerri for the preferred bidder said that he has a document that shows that Samsung uses S-Energy made panels to market as Samsung. Samsung obtains its photovoltaic panels that are marketed as Samsung, from S-Energy.

Anthony Saliba on behalf of the preferred bidder explained that S-Energy separated from Samsung. Samsung was never the manufacturer of panels but these were manufactured by S-Energy.

Chairman Public Contracts Review Board stated that since company was formed in 2001, it could not have 14 years experience. It is not a case where Directors of a company are using their experience to give evidence of experience of another company. Internet information alone is not an acceptable substitute for legal documentation and the Board would thus require an authenticated certificate which shows the relationship between Samsung and S-Energy.

Professor Joseph Micallef continued explaining and rebutting points 3 and 4 of appellants' grievances. Regarding the tolerance, submits that appellants got it wrong. He explained that +/- 3% tolerance is in fact better than +/- 5% and not worse. Regarding the coating of the frames, he contends that Section 4 states that the frames should be according to EN 612. The product supplied by preferred bidders is made with thick anodizing and this fact does not need any other coating and was certified by a German firm. On the optimizer he stated that he asked for it as additional equipment to be able to test it. There was no need for this optimizer and bid was compliant without it. It was not a variant solution. It was an additional option for this optimizer. We asked for these options from all the bidders.

Dr Mario Scerri promised that within three weeks he would submit the requested certificate, copying also the appellants, and the hearing was brought to an end.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 28th January 2013 and also through the Appellant's verbal submissions during the hearing held on 16th July 2013, had objected to the decision taken by the pertinent Authority, in that:

a) The Tender document required that the manufacture of the panels have at least 14 years experience in the manufacture of the same product. The Preferred Bidder's supplier was only formed in 2001. Hence, no 14 years experience.

b) Re: Tolerances

The recommended bidder does not fulfil the requirements.

c) Re: Coating

The Appellant's bid does not meet the requirements as stipulated in the tender document's technical requirements.

d) Re: Optimizer

The recommended bidder goes beyond the requirements as set out in the tender document.

Having considered the Contracting Authority's verbal submissions presented by same during the hearing held on 16th July 2013, in that:

a) Although the Preferred Bidder's Offer was the cheapest, the Evaluation Board of the Contracting Authority emphasized their assessment and evaluation on the technical merits of the offer.

b) The preferred bidder's suppliers have a direct connection with 'Samsung'. In fact, the panels are marked as 'Samsung' product but manufactured the the preferred bidder's suppliers, ie S-Energy.

c) Re: Tolerances

The Appellant did not understand the interpretation of tolerances. In actual fact the Preferred Bidder's offer quoted a better statistical performance.

d) Re: Coating

The Product offered by the Preferred Bidder does not require any other coating. This fact was certified by a German firm.

e) Re: Optimizer

This represented additional equipment for testing only. In fact the tender would have been compliant without this item.

Reached the following conclusions:

- 1. From the verbal submissions by the Contracting Authority, it is evidently clear that the Preferred Bidder's Offer is more 'Technically Compliant' than that of the Appellant.**
- 2. From documentation received, after the hearing which was held on 16th July 2013, it transpired that S-Energy does indeed have a direct relationship with 'Samsung'. In fact Samsung has a vested interest in S-Energy representing 14.67% of the Shareholding of S- Energy. This fact also assures that the knowledge and back up experience is to the benefit of the Preferred Bidder's suppliers.**
- 3. The Preferred Bidder's Offer was also the cheapest.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Richard A. Matrenza
Member

24 September 2013