

PUBLIC CONTRACTS REVIEW BOARD

Case No. 578

CT 3115/2012

Tender for the Supply, Delivery and Installation of College (Lecture room, Laboratory, Office, Staffroom, Auditorium) Furniture and Equipment.

The tender was published on the 4th December 2012. The closing date was the 29th January 2013.

The estimated value of the Tender was €2,010,858.07 (Inclusive of VAT).

Eleven Bidders (11) bidders submitted their offers for eight (8) Lots.

Lot 1: Laboratory Furniture

On the 25th June 2013, Flores Valles S.A. filed an objection against the rejection of their bid as being technically non-compliant and the award of the tender to Evolve Limited.

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 6th August 2013 to discuss the appeal.

Present for the hearing:

Flores Valles S.A. - Appellant

Mr Paul J Pace	Representative
Mr Noel Delia	Representative
Mr Duarte Gouveia	Representative
Dr Caroline Farrugia	Legal Representative

Evolve Limited – Recommended Bidder for Lot 1

Mr Lawrence Zammit	Sales Executive Manager
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Malta College of Arts, Science and Technology – Contracting Authority

Arch Deborah Borg	Chairperson Evaluation board
Arch Karl Cutajar	Member Evaluation Board
Ing Damien Gatt	Member Evaluation Board
Dr Ing. Alex Rizzo	Member Evaluation Board
Mr Emanuel Attard	Representative
Dr Peter Fenech	Legal Representative

The Chairman PCRb remarked that the appellant firm in its appeal did not give any reasons

for this appeal.

After a brief introduction, the Chairman invited the appellant to give the reasons behind his objection.

Dr Caroline Farrugia, legal representative on behalf of appellant stated that when the tender was issued, specifications on page 96 stated that laboratory benches should be sliding underneath the laboratory cabinets. Page 62 requires the C-frames to glide to the right or left. The number of cabinets was not stated anywhere in the tender document. Appellants had asked for a clarification on this point. The clarification was given on the 21st January 2013. This clarification changed the tender specifications completely. Instead of sliding under bench cabinet a fixed C-frame system became acceptable. The closing date was the 29th January 2013. Clients had not enough time to make another alternative bid showing both sliding and suspended frames. Appellants were misinformed because the tender had specified gliding systems. The tender had asked for leg room but again this was changed.

Dr Peter Fenech appearing on behalf of the contracting authority here made a formal objection. The contracting authority came prepared to this hearing to deal with appellant's non-compliance. During this hearing, appellants are changing the appeal parameters, claiming that the tender parameters had been changed. This action is not permissible at law. Appellant's bid was non compliant. The clarification was issued within the legal period because the tender closing date was the 29th January 2013. The clarification did not change any specifications but widened them and admitted new parameters. Had appellant's bid been compliant in the first instance, it would have remained so compliant. But appellant's bid was not compliant because the relevant mandatory items were missing or incorrect. Tender asked for coated brass or stainless steel fittings, for example, while appellant offered galvanized steel.

Engineer Damien Gatt on behalf of the contracting authority stated that the main points in which the appellant was not technically compliant were: 1. Combined shower stand. This had to be either brass or stainless steel. Appellants offered a galvanized product. 2. Cabinets had to occupy the maximum possible space under the work top. Appellants' offer showed a void space larger than the width of a cabinet. Even after we asked them for clarification, the offer remained the same. They offered thirty three cabinets less than required. Their bid should have maximised the number of cabinets, instead they offered more void spaces. This was all reported in the evaluation report. On being cross-examined by Dr Farrugia, Mr Gatt explained that the cabinets had to be easily removed for access in the event of an emergency, and these specifications were not changed.

Dr Caroline Farrugia for appellants affirmed that the fact that there was a clarification issued on the 21st January 2013 goes against Clause 6 of the Procurement Regulations which state that specifications should not change by more than 5%. Contended that when specifications were changed from sliding to fixed this amounted to such a change.

Mr Damien Gatt on being asked by the Board affirmed that there had been no changes to the specifications. There are both gliding and suspended cabinets. If a bidder offered gliding cabinets, he would have still been compliant. An additional option for suspended cabinets was included.

Mr Noel Delia on behalf of appellants, under oath stated 1.1.7 of the tender document states

that the C frame should have a rail, slider installed under the work area so that suspended units under the bench can easily glide. This made sense because this slider allowed easy access to the back of the cabinets. He claimed that when this was changed to allow for fixed cabinets, this amounted to change in specifications of more than 50%. The gliding C frame would certainly be more costly. This was not fair since appellants spent more than a month to formulate their offer, and this change only gave appellants a few days to re-submit another offer.

Winding up, Dr Peter Fenech reiterated that the clarification issued on the 21st January 2013 did not affect appellant's offer in any way. Their offer would still have been compliant. However their bid was disqualified not because of this change, but because what they had offered, in the option they chose, was not technically compliant. Other bidders chose to bid giving both options.

In her winding up, Dr Caroline Farrugia, for appellants insisted that tender was unfair because originally specifications asked for gliding cabinets. These specifications were later changed, allowing suspended cabinets. If her clients knew that such suspended cabinets were admissible they would have offered them. But they did not have the necessary time within which to do so. Regarding the other reason for appellant's disqualification, Dr Farrugia claimed that the tender document did not contain a bill of quantities that showed the number of units, and it was left to the discretion of bidders to state the number of cabinets.

Dr Peter Fenech stated that the contracting authority required the maximum number of cabinets within the available space. It was clearly set down in the tender document that any void space remaining had to be "smaller than the width of the smallest cabinet." This specification was so formulated because the contracting authority did not know the width of the cabinet units stocked by all the bidders and so left it to them to provide the maximum number.

The hearing was here brought to a close.

This Board,

Having noted the Appellant' objection ' in terms of letter (Without giving reasons) dated 21st June 2013 and also through the Appellant's verbal submissions during the hearing held on the 6th August 2013, had objected to the decision taken by the pertinent Authority, in that:

- a) The Appellant had asked for clarifications, during the evaluation process , from the Contracting Authority.**
- b) The reply from the Contracting Authority was received by the Appellant on the 21st January 2013.**
- c) The Clarifications received by the Appellant involved changes to the specifications in the tender.**
- d) Due to the fact that the closing date of the tender was 29th January 2013, the Appellant did not have enough time to submit the additional and varied specifications.**

Having noted the 'letter of Reply' by the Contracting Authority dated 2nd August 2013 and through verbal submissions presented by same during the hearing held on the 6th August 2013, in that :

- a) The Appellant's bid was technically 'non compliant.'**
- b) The clarifications did not alter in any way the specifications of the tender.**
- c) The clarifications were issued within the legal period; because the tender's closing date was 29th January 2013.**

Reached the following conclusions:

- 1. That the tender document specifically stated the technical reasons for not specifying the quantities in the same document were:
 - i. That this depended on the size of the cabinets.**
 - ii. That the space available for the products had to be utilised in the most efficient way with enough back space for urgent removal and maintenance of electric appliances at the back of the cabinets.****
- 2. That from the submissions made by the Contracting Authority's evaluation board. It was proved that the Appellant's bid was not 'Technically Compliant'.**
- 3. That clarifications made or requested during the evaluation state do not constitute either an 'Addition' to specifications or 'Alterations' to the specifications of the tender.**

In view of the above, this Board finds against the Appellant 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**

14 August 2013