

PUBLIC CONTRACTS REVIEW BOARD

Case No. 651

CT 3117/2013

Tender for the Design, Supply, Installation and Commissioning of Photovoltaic Systems on a Number of Gozo Governmental Schools.

The tender was published on the 6th September 2013. The closing date was the 17th October 2013.

The estimated value of the Tender was €1,226,892.80 (Exclusive of VAT).

Nine (9) bids had been received for this tender.

On the 23rd December 2013 Econetique Limited filed an objection against rejection of its bids as being technically non-compliant and the proposed award of the tender to Bajada New Energy Limited Option 1.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday the 14th January 2014 to discuss the objection.

Present for the hearing were:

Econetique Limited - Appellant

Mr Joseph Borg	Representative
Ms Jenny Cassar	Representative
Ing. Ryan Xuereb	Representative
Mr Charles Borg	Representative
Dr Kris Borg	Legal Representative

Bajada New Energy Limited - Preferred Bidder

Mr Mark Bajada	Representative
Mr Stephen Fenech	Representative

Ministry for Education and Employment - Contracting Authority

Mr Christopher Pullicino	Chairman Evaluation Board
Mr Ivan Zammit	Secretary Evaluation Board
Mr Leonard Zammit	Member Evaluation Board
Mr Vince Rapa	Technical Adviser

Department of Contracts

Mr Jonathan Barbara
Mr Kevin Dugo

Following a short introduction by the Chairman, the appellant's representative was invited to put forward his submissions on the objection.

Dr Kris Borg on behalf of the appellant said that his client had submitted two options for this tender, and its bids were cheaper than the preferred bidder's, and contended that appellant's bids were compliant. He said that the first reason for the rejection of appellant's bid, common to both options was that appellant did not provide the warranty on the structure for twenty five years, as requested. He contended that this was simply not true since the appellant's bid contained an attachment "Additional Structures" wherein it was stated that the structure was in hot dip galvanized material and this galvanizing in itself shows that the structure would last for twenty five years. Furthermore the attachment continued in stating that it was in line with conditions requested in the tender document. This means that what was requested was in fact being given. He could not see how this could not be interpreted as sufficient warranty. Regarding the second reason for disqualification, Dr Borg continued was that "*Evidence that the proposed equipment is approved by MRA and supplied by the same. The tenderer submitted evidence that the PV modules are approved by MRA, however no indication of the approval of the inverters has been submitted.*" He contended that in industry, the praxis is that the commercial code prevails over the civil code. In the industry, photovoltaic systems for domestic use required the approval by MRA for both the panels and the inverters. In the commercial use, the MRA approval for inverters was never requested. He contended that wording used in the tender is unintelligible. He could not guess the meaning of "*equipment is approved by MRA and supplied by the same.*" The MRA does not supply panels. The tender specified that proposed equipment had to be approved by the MRA. He asked where is one to draw the line what the proposed equipment is. Why were only the inverters targeted for the need of approval?

Dr Kris Borg continued that in fact the same make of inverters submitted by appellant were in fact approved by the MRA and are shown on the MRA website. Another firm had obtained this approval but the inverters were the same kind. He said that the evaluation board had apparently insisted that the inverters had to be approved by the MRA explicitly on the application by the appellant Econetique Ltd. He contended that by the time the evaluation had been concluded appellant had in fact obtained the approval of the MRA. He said that the third reason for the rejection of appellant's tender was that the "offer does not meet the technical criteria requested in the tender document," but no explanation of what these criteria were, was given. Regarding his client's option 2 Dr Borg continued that appellant wanted to offer cheaper equipment giving the same value and had identified a supplier of this equipment. Appellant had applied with the MRA for the registration of this equipment. The evaluation board had asked through a phone call whether this equipment was registered. Appellant informed the caller that the application was submitted but approval was still being awaited from the MRA. However the engineer at MRA was away on the date and the approval was still not visible on the MRA website. In fact the approval had been issued but was not yet shown on the website.

Engineer Vince Rapa on behalf of the contracting authority said that this tender was benefitting from European Union Funding and was urgent. He said that the preferred bidder was around the fourth cheapest bidder and not the cheapest, but he was the cheapest compliant bidder. Bidders had to submit with their tenders certain items, the failure to do so disqualify them. One of these requirements was the submission of a warranty on the structure supporting the panels for twenty five year. This was not submitted by appellant. Furthermore there was no evidence of MRA approval. In Option 2 there was a declaration in appellant's bid which stated that at that stage there was no MRA approval yet but this would be available the next week. The evaluation process ended on the 20th November 2013 and He had

personally checked with the MRA website to see if the equipment offered in appellant's Option 2 had been registered. Appellant had replied to a clarification request that the registration would be approved later. The tender document required that the approval of the equipment had to be available when the tender was submitted. Bidders had fifty days in which to obtain the approval. It was MRA that had to approve the panels and inverters to be used. He said that the submission of the approval was part of the technical compliance.

Mr Ivan Zammit for the contracting authority said that the evaluation board, of which he was the secretary, was under pressure to adjudicate the tender because of the EU funds. It was important that the requested literature had to be submitted by the closing date of the tender. Appellant's offer did not have this by the closing date. The Evaluation Board nonetheless when evaluating, one month after the closing date of the tender still checked appellant's approvals but found that these were still missing and appellant's bid was still not compliant. The evaluation board had no obligation to check, but still chose to do so. According to Clause 16 of the tender, the price is the last factor to be examined and evaluated. The evaluation board had to decide the award with urgency and could not wait further.

Mr Ryan Xuereb on behalf of appellant said that appellant had submitted the application for approval by MRA before the tender closing date. The application was made on the 15th October 2013 while the tender closed on the 17th October 2013.

Dr Kris Borg reiterated that the inverters submitted by appellant in Option 1 had already been approved by the MRA at the request of another firm. Appellant had also indicated in Option 2 that the MRA approval was still pending. On the 20th October 2013, appellant was asked by the contracting authority if the product had been approved. MRA had replied on the 21st October 2013 that the panels had been approved and appellant informed the contracting authority accordingly on the same date.

Mr Ryan Xuereb continued that the contracting authority had asked for clarification on the 20th October 2013. Since the person who certified the panels at MRA was away, MRA had informed appellant on the 21st October of the approval and the contracting authority was immediately informed of this on the 21st October 2013.

Mr Vince Rapa for the contracting authority said that the evaluation board on the 20th October 2013 demanded that I state whether as of date, appellant's equipment was on the MRA's website or not. I checked and found that it was still not on the webpage. I had therefore contacted the appellant and asked him to confirm that there had been an approval, and if so to provide proof. This proof was not forthcoming. The evaluation board was in session to evaluate at that time and was under pressure to adjudicate.

Dr Kris Borg insisted that in his client's Option 1 offer, the equipment had been approved; the panels by the same appellant and the inverters by another firm.

Mr Ivan Zammit on behalf of the contracting authority said that the tender document required that the approval of equipment had to be given to the bidders themselves. This was what "*Evidence that the proposed equipment is approved by MRA and supplied by the same*" meant, supplied by the bidder. Apart from this, appellant failed to produce the warranty covering the equipment for twenty five years for neither of the options he submitted.

At this point the hearing was brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 19th December 2013, and also through the Appellant's verbal submissions during the hearing held on 14th January 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) The Appellant contends that the technical literature did indicate the required warranty as stated in the tender document. The production process of the structure itself was proof enough that same could last for at least twenty five years.**
- b) Although at the time of the evaluation process, the Appellant's product was not as yet officially approved by MRA, however as duly informed by the Appellant, the MRA approval was available within the time of the conclusion of the evaluation process. So that the Appellant's offered product was in fact approved by MRA.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 14th January 2014, in that:

- a) The Preferred Bidder's offer, as adjudicated by the Evaluation Board, was the fourth cheapest but was still the cheapest compliant bidder.**
- b) The mandatory requirements which the Appellant failed to provide were:
 - i) A warranty on the structure supporting the panels for at least twenty five years.**
 - ii) Evidence that the product being offered by the Appellant was registered as approved by MRA.****
- c) Since this tender was EU funded, the Evaluation Board were under pressure to strictly abide by its timetable. At the end of the evaluation process, the Appellant could not provide the mandatory requirements as specified above.**
- d) The Evaluation Board went even further than was expected, in fact , one month after the closing date of the tender, same Board still enquired whether the Appellant's product was registered as approved by MRA. The result was in the negative.**

Reached the following conclusions:

- 1. This Board notes that this tender is EU funded. All EU funded projects are to be given top priority and as such the adjudicating process of this Board is on a 'fast track' basis. The tenderer has to be very meticulous when submitting the tender document, keeping in mind that each EU funded tender is thoroughly scrutinised**

by the EU supervisors who approves the funds. No tolerance is accepted by the same supervisory Board for non submission of the required documentation as stipulated in the tender document.

- 2. The required submissions which the Appellant failed to submit within the stipulated period were mandatory and in this regard the Appellant's offer was not compliant.**

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. Lawrence Ancillieri
Member

28 January 2014