

PUBLIC CONTRACTS REVIEW BOARD

Case No. 693

CT 3039/2013

Tender for the Design, Supply, Installation of an LED Architectural Lighting System for the Birgu Landfront Fortifications and Intramural Spaced (Landfront Fortifications, Landfront and Secondary Ditches, and Historical City Centre).

The tender was published on the 21st June 2013. The closing date was the 20th August 2013.

The estimated value of the Tender was €2,795,248.09 (Inclusive of VAT).

Five (5) bids had been received for this tender.

On the 4th April 2014 Lighting Malta Joint Venture filed an objection against the rejection of its offer which was declared to be technically non-compliant and against the proposed award of the tender to Raymond Vella & Co Limited for the price of €2,646,703.

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 29th April 2014 to discuss the objection.

Present for the hearing were:

Lighting Malta Joint Venture - Appellant

Mr Johann Aloisio	Representative
Mr Arvin Camilleri	Representative
Mr Ludwig Camilleri	Representative
Mr Liam Ferriggi	Representative
Mr Gabriele Rosetti	Representative
Dr Veronique Dalli	Legal Representative
Dr Mark Portelli	Legal Representative
Dr Robert Abela	Legal Representative

Raymond Vella & Co Limited - Preferred Bidder

Architect Amedeo Mifsud	Representative
Mr Dennis Baldacchino	Representative
Ms Fleur Vella	Representative
Mr Nigel Vella	Representative
Mr Raymond Vella	Representative
Ms Stefania Vella	Representative
Dr Reuben Farrugia	Legal Representative

Ministry of Tourism - Contracting Authority

Architect Norbert Gatt	Chairman Evaluation Board
Ms Renata Zerafa	Secretary Evaluation Board
Ing. Joe Abela	Member Evaluation Board
Architect Herman Bonnici	Member Evaluation Board
Architect Chanelle Busuttil	Member Evaluation Board
Mr Russel Muscat	Member Evaluation Board

Department of Contracts

Mr Anthony Cachia	Director General
Mr Kevin D'Ugo	Procurement Manager
Mr Vincent Dougall	Representative
Mr Joseph Caruana	Representative
Dr Franco Agius	Legal Representative

Witnesses

Mr Anthony Bonnici	GO Plc Representative
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The Chairman made a brief introduction and asked the appellant's representative to make his submissions on the objections.

At this point Dr Reuben Farrugia on behalf of the preferred bidder pointed out that in his letter of replay he had raised two preliminary procedural pleas and demanded that these be decided before going on to hear the case as further hearing could be irrelevant.

The Chairman said that the Board would go into these pleas after hearing the evidence and the submissions on the objection.

Mr Ludwig Camilleri ID No. 501974M on behalf of the appellant under oath testified. He was shown some photographs that were filed by Dr Veronique Dalli, appellant's legal representative and he explained that the first one marked LC1 showed the appellant's lighting system on the fortifications being projected from the ground during the night trials. The second one marked LC2 shows the same fortifications at Kalkara being lit by the lights submitted by the preferred bidder also during the night trials. The third photograph, he continued to explain was another one showing the preferred bidder's lights from another angle. He said that these two show that the light is thrown on to the fortifications from scissor platforms and not projected up from the ground. He stated that he had taken the photographs himself. Each bidder had been assigned a different area to light during the night trials.

He had not received any fax on the 28th February 2014. He heard that the tender was awarded from Mr Vella himself whom he had met during a concert. He had therefore on Monday phoned the Contracts Department. On Sunday he had checked the Department's website but this did not have any information about the award of the tender in question or on appellant's disqualification. The Department of Contracts had informed him that a fax had been sent to him informing him of the appellant's disqualification. He always received communications from the Department by email and he was informed through an email of the disqualification of appellant on the 25th March 2014.

Dr Franco Agius on behalf of the Department of Contracts confirmed that the notice of disqualification had been sent through fax. In fact all recommendations are notified through fax. He explained that the Fax Transmission report shows the wrong date because the Department's Fax had lost its settings. However he insists that on the 28th February 2014 the fax machine had communicated with the appellant's machine and this will be proven through witnesses.

Mr Anthony Bonnici ID No. 10474M on behalf of GO Plc. under oath confirmed that on the 28th February 2014, there had been a connection between the Department of Contracts phone number 21247681 with telephone number 21800225 at 12.07. He said that the duration of this communication was 86 seconds. He could not state whether the communication was through fax transmission or an ordinary phone call. He could only state that there had been a connection between the two numbers. He could not state whether during the communication any data was passed. GO Plc has the incoming data but this is kept only for cases involving police criminal investigations of serious crimes. A blank document transmitted through the fax would give the same result as an ordinary document.

Mr Vincent Dougall on behalf of the Department of Contracts under oath testified that he works at the IT section of the Department. He was the procurement manager, electronics. He confirmed that recently the fax machine had lost its settings and had to be reset. The date had

been reset once the fact of the lost settings had been made known to him. However during the interim the fax machine had continued to be used normally. Every contract awarded is notified through this fax, and several tenders are awarded each week and no complaints had been received. The fault was discovered some weeks after the case in question but he could not state when the settings had been lost. When we checked with GO, on all faxes sent and not specifically for the present case, GO Plc had informed us that the faxes had been delivered just the same. The Fax report the Department receives for each fax sent contains the date and if delivery was OK. The date at the receiver end would still be the right date even if the sending fax had lost its settings. The fax in question had not been sent by him personally. Now the department is also sending emails as well as fax when informing bidders. The department had checked and verified with GO the times and delivery of all faxes sent during the time the settings had been lost.

Replying to a question made by the Chairman, Mr Dougall continued that there is always a discrepancy in the duration of the calls between that shown by the machine and that showed by GO, it is about 10 seconds for each fax. This is the lapse of time when the connection was being made between the two machines. All faxes, as explained, sent during the period in question had been checked and in all cases there is this discrepancy of around 10 seconds. He said that no check with the receivers had been made whether the faxes sent during the period had been received. Replying to questions by Dr Rueben Farrugia, Mr Dougall said that the 'handshake' is the interval of time that elapses until the sending machine receives the reply from the receiver that a connection had been established and data can be sent. The OK in the report refers to this confirmation that data could be sent. Replying to questions by Dr Abela he said that faxes show the number of the originating fax. He does not send the faxes himself and cannot state what was sent and received.

At this point the witness was shown the delivery report and he explained that 21800225 was the number of the receiving fax. "Pages 4" meant that four pages had been transmitted. The "OK" means that 4 pages had been delivered.

Mr Joe Caruana ID No 266568M, from the Department of Contracts Registry Section under oath said that his section is responsible for file movements and sending faxes for the Department. It was the procurement manager who gives instructions what faxes are to be sent. If problems are encountered when faxes are sent, for example a busy signal is received, then emails are sent instead. He was shown the delivery report in question and confirmed that the fax had been sent by him. The report said OK which means the fax had been delivered. Normally when some faxes are not clearly received the receivers usually telephone the Department and ask for another fax to be sent. On the 28th February 2014 other faxes had been sent and no complaints had been received. Replying to questions from Dr Robert Abela for the appellant he said that he knows the date from having examined the shown report and not because he remembered the case. He explained that to him the OK signified delivery of four pages and he had not noticed the date. He had not notified anyone of the wrong date and time. He confirmed that he did not notice the wrong date during the three weeks until he was informed of the erroneous date. There had been no other complaints and that meant that there were no problems. The present procedure being followed is to send emails as well as faxes to the bidders involved but these emails are not sent by registry but by the procurement manager.

Dr Robert Abela declared that the fax number of the appellant Joint Venture is 21800225.

Dr Franco Agius explained that the law required that notification of successful and unsuccessful bidders had to be sent by fax or other electronic means. The Department used

that method to notify bidders. Nowadays however the Department is sending also emails. Previously emails had been sent when the delivery report had shown that the fax had not been delivered. In the present case this was not so and he contended that the fax had been sent.

Dr Robert Abela for the appellant stressed that the tender was important because it was valued at over 2.6 million euro because it involved 85% funding by the European Union and 15% from public funds. He said that it was expected that the tender would be treated with at least a minimum of transparency, accountability and seriousness in method of consideration. However from the hearing today it transpired that this was not done, the minimum levels had not been reached. The delivery report had showed certain mistakes and faults, the date was three years out, and yet had been completely ignored. The Department should have ascertained that the notices had been delivered. It was only after three weeks that the mistakes were corrected. He expected that the present case would be decided by the Board ensuring that justice is handed out. Mistakes done by the Department of Contracts should not give an advantage to other bidders. The Public Contracts Review Board should also safeguard against the waste of public monies. The preferred bidder's offer was one fourth of a million euro higher than that of appellant and the sole criterion was the price if technically compliant.

This was a three package tender and there was no difficulty with the first package. The second package dealt with the administrative compliance and technical compliance. He said that it had to be seen whether appellant's bid conformed to the tender. Article 30.4 at page 19 of the tender document stated that *"the evaluation committee will analyse the administratively compliant tenders' technical conformity in relation to the technical specifications (Volume 3, and the documentation requested by the Contracting Authority as per sub-clause 16 (e)), classifying them technically compliant or non compliant."* This Article continues: *"Tenders who are deemed to be provisionally technically compliant"* this means that those tenderers whose submitted documentation conforms to volume 3 of the tender document are allowed to go to the subsequent phase. This phase is the submission of samples and the night trials. Thus he contended that the first stage where samples are to be submitted was passed because the documents submitted concurred with the requisites had been passed. Appellant also reached the stage of the night trials. He contended that thus appellant's tender had passed all the stages. He explained that the fact that having passed the first stage of the process, that the documents conformed to the tender, did not mean that automatically appellant's bid would pass to the opening of the third package because the tender used the word provisionally. This meant that bidders' offers would pass through provided the samples submitted by them conformed to the documents already submitted. If the samples did not conform to the documents then the bid would be rejected. The same could be said for the night trials, which the appellant passed as well. However while the appellant was awaiting the result of the second stage, he learnt that the tender was awarded to the preferred bidder. He stated that it resulted that the same evaluation board that had considered appellant's offer as being technically compliant, went on to decide that appellant's offer was not compliant. He contended that once appellant was asked to produce samples and night trials this meant that what he offered was technically compliant. His tender could not be disqualified at that stage. He reiterated that Article 30.4 meant that samples would only be asked from technical compliant bidders. He claimed that in the letter of objection he had rebutted all the items that his client was deemed not to be compliant with.

Architect Robert Gatt, the Chairman of the Evaluation Board under oath explained that the evaluation board comprised five technical members. He said that the board's technical

recommendation on form 10 listed all the items where the appellant's equipment was not compliant to requisites, for example that the colour rendering did not reach the minimum requirements. These items did not involve only the lighting equipment and can be seen from form 10. The evaluation board had met for more than 10 times and studied the bids in detail.

Dr. Robert Abela continued that he had been present during the night trials. Engineer Joe Abela was not present for the last night trial but this trial continued just the same. The evaluation board did not ask for any clarifications. The witness stated that he was present for the night trials of the preferred bidder's equipment. (At this point Dr Reuben Farrugia objected to the asking of questions about the preferred bidder's compliance because this was procedurally incorrect.) The evaluation board, prior to the asking for samples, had evaluated the technical documentation of the bidders. They did not find anything noncompliant in appellant's offer. He explained that the night trials had not been asked for after evaluation of the technical compliancy of the bids as the appellant implied. Clause 30.4 refers to clause 16.E that had to be already checked and assessed by the evaluation board to see if the bids were provisionally compliant or not. The night trials were part of the process and were not held after the decision whether offers were compliant or not.

The Chairman remarked that it has been established that the night trials were part of the evaluation process.

Architect Robert Abela continued that the evaluation board listed its findings in form 10 which summarised all assessments including the night trials and the samples. These recommendations were accepted by the board and by the General Contracts Committee. Replying to a question by Dr Robert Abela, witness said that the evaluation board assessed all the information submitted by bidders under Clause 16 e. Amongst these were the night trials. All the bidders had been asked in the same email to submit samples and conduct the night trials. The evaluation process included three phases, the administrative compliance, the technical compliance and the financial offer. The technical compliance was not sub-divided into four. It was one factor of evaluation. The evaluation board did not make any evaluation exercise to see if the submitted documents tallied with volume 3 before asking for the samples. The night trials were part of the process whereby bids were assessed provisionally. The night trials were held using the samples that had been submitted by the bidders. Clause 16 E. (vi) required that night trials had to be made. Replying to questions by Dr Abela on behalf of the appellant at what stage had appellant's bid been discarded the witness replied that Form 10 shows in detail where appellant's bid was not in order and refers to specifications contained in the documentation. The night trials were conducted using the same fittings and light sources as those proposed to be used in the actual installations.

Dr Franco Agius on behalf of the Department of Contracts referred to the letter of reply submitted by the Department and explained that the Clause under which appellant is claiming that the preferred bidder was non-compliant was not mandatory but was generic. If the appellant does not prove that its bid was compliant then this point becomes irrelevant.

The Chairman remarked that the Board had to be satisfied that the process was transparent and just.

Replying to Dr Abela the witness Architect Robert Gatt said that appellant's documentation was already available from the opening of the second package because the technical evaluation process was one. It was not possible to conduct night trials without having the

samples. Replying to the Chairman, witness said that the evaluation board was satisfied with the preferred bidder's technical offer.

Dr Robert Abela for the appellant stated that his client's samples were compliant, his client's night trials were also compliant and the evaluation board only found non-compliance with the documentation submitted. He contended that the evaluation committee did not follow what was required by the tender document. Appellant's documentation had been found compliant before the night trials it was only after that the matter of non-compliance of the documentation was raised. The above results from the evidence produced. He contended that had a clarification been demanded the appellant would have clarified matters. The evaluation board used its discretion differently between the bidders. It was alleged that appellant did not indicate consumption but he gave the wattage and number of bulbs and the KW per hour could have been worked out or a clarification demanded. Another item was the light rendering because this in appellant's case the RA was less than 80 when more than 80 was required. Appellant's lights gave an RA greater than 75 and were disqualified for this.

He insisted that appellant was not informed of the disqualification and therefore had to object at this stage of the proceedings. He said that the objection was against the finding of his client's bid as non-compliant. He insisted that his client's bid was compliant. The appellant's last grievance was that the preferred bidder did not conform to the tender specifications because he used lamp-posts. He could not understand how the evaluation board deemed this to be compliant. He insisted that the PCRb should examine whether the evaluation board had abided by the tender document. Finally Dr Abela said that Regulation 84 gave appellant the right to appeal because anyone who has an interest can object. The appellant's financial offer was disclosed after the conclusion of the process.

Dr Franco Agius referred to a Court decree in the case AIS vs Director of Contracts where Mr Justice Zammit McKeon said that to object under Regulation 84 one had to have submitted a tender. This was a 3 package procedure and after each process the stage is closed. Regulation 83.10 says that a bidder can object again under Regulation 84 only if he had objected under Regulation 83 and had his objection rejected. He referred to the contracting authority's letter of reply where the reasons for appellant's disqualification were listed. For example in appellant's "Method statement against vandalism" was written just that an insurance cover would be obtained. Bidders had an obligation to submit clear bids and appellant's RA submission had not been explained. This resulted even from European Court Jurisprudence that the contracting authority had to contact the tenderers asking for clarifications when the tenders themselves were not clear through lack of diligence when drafting their tenders. The contracting authority has acted with diligence and the fax had been sent. Furthermore he asserted that it was not true that the request for samples meant that appellant's bid was compliant. To evaluate the tenders the evaluation board had to have seen the night trials and these trials could not be carried out without the equipment. It was in this context that the request to submit samples had been made to appellant and not because the offer made by appellant was deemed provisionally compliant. The only decision that had been reached was that sent on the 28th February 2014 – that appellant's bid was not technically compliant. Dr Agius continued that the statements in the letter of objection were not true. The pages referred to in the letter of objection contain different items to those claimed, citing for example item i) m. of Form 10.

Dr Reuben Farrugia on behalf of the preferred bidder first addressed his preliminary plea if the appellant could have objected at this stage. He said that appellant could have had another

remedy but not before the Public Contracts Review Board. This tender was a three package tender and as such was regulated by Regulation 83.10. This states that *“any tenderer or any other person having or having had any interest in obtaining a particular public contract whose complaint under this part is not upheld, shall have the right to have recourse to the procedure for appeals as provided for in part XIII when the offer reaches the final stages of the award – the financial package.”* This means that any bidder who had been excluded at any previous stage then he could appeal under this Regulation. An omission by the contracting authority regarding notification does not give appellant any right to appeal at this stage. Appellant had other remedies but not before this Board. Appellant had no right of review; the law is clear on this point. He stressed that the appellant having disclosed his financial offer was in breach of public procurement regulations and this should lead to automatic conclusion. This objection is demanding to be reintegrated into the evaluation process and not to be awarded the tender. Appellant is asking to be reintegrated but at the same time divulged the financial offer. It was for a reason that financial bids could not be divulged before the financial evaluation, not to have this influencing the technical decisions. And for this reason the objection should be rejected. He explained that provisional means temporary or conditional pending confirmation or validation. The evaluation board had adjudicated and it was not correct to state that the evaluation board should have asked for clarification. No proof had been brought by appellant to show that its offer was technically compliant. The Department of Contracts said that in appellant’s submission the light rendering was indicated to be 75 and nowhere in the appellant’s submission was explained that this could be adjusted through software. The bidders are required to submit a clear submission not requiring clarifications. Yet appellant is now attacking the evaluation board claiming that it should have asked for clarification.

Dr Farrugia continued that it was a principle already decided several times that once the Department affirms that the fax in question had been sent, then it was the appellant who was to prove that it was not received. In the present case a witness from GO had confirmed that a call had been received on the date in question on the appellant’s fax machine. No proof has been brought to show that this had not been received. He claimed that the shortlist of bidders was published in the Department’s Website and did not include appellant which meant that it was excluded. He remarked and referred to the letter of reply about allegations made by appellant regarding communication with the Department of Contracts employees. He said that witness Architect Gatt had explained appellant’s technical non-compliance. As regards the objection to the preferred bidder’s light system, this has been clearly explained by the same witness that the fixing of the lights in the ground had not been mandatory, at any rate since the appellant is not requesting the award of the tender, then appellant cannot complain on the preferred bidder’s compliancy. The cheapest offer is not necessarily the best offer.

Dr Robert Abela on behalf of appellant said that he was perplexed how the evaluation board had at one point declared that it was satisfied with appellant’s submissions and asked for samples and night trials and then overturned this decision after this stage by claiming that the documentation was not compliant. He referred to Clause 30.4 and the evaluation board should have abided by it.

Dr Franco Agius explained that appellant had not been asked for samples but these were needed for conducting the night trials and Clause 30.4 had to be seen in the context. Only one decision had been published, that appellant’s offer was not compliant.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 4th April 2014 and also through Appellant's verbal submissions during the hearing held on 29th April 2014, wherein appellant had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant contends that he was not informed by the Contracting Authority that his offer was rejected. Appellant claims that the Fax which the Contracting Authority is claiming to have been transmitted to him on 28th February 2014 was in fact never received by the latter.**
- b) Appellant also claims that since he was asked to produce samples and conduct 'Night Trials', he was technically compliant.**

Having considered the Contracting Authority's 'Letter of Reply' (undated) and verbal submissions held during the hearing held on 29th April 2014, in that:

- a) The Contracting Authority confirmed and provided documentary evidence that the Fax denoting refusal of Appellant's offer was in fact communicated to Appellant on 28th February 2014.**
- b) The fact that the Appellant was asked to produce samples and conduct 'night trials' did in no way confirm that Appellant's offer was technically compliant. Only tenderers who were considered to be 'Temporarily Technically Compliant', were asked to produce samples and conduct 'night trials'.**
- c) Most important of all, at this stage of the evaluation process, Appellant presented this objection under Regulation 84. Appellant had other remedies under Regulation 83 to file an objection within 10 days from the date of the notice of refusal. Appellant's offer failed the test at the second envelope stage and he should have objected within the time frame and under Regulation 83.**

After going in great depth, this Board reached the following conclusions:

- 1. From the submissions made by the technical witness, under oath, and also from documentation presented at the hearing, this Board is convinced that a Fax was sent on 28th February 2014, was sent by the Contracting Authority to the Appellant informing him of the decision taken by the Evaluation Board. It was technically proved that communication via fax was addressed by the Contracting Authority to the Appellant on his contact number. The fax machine recorded that the fax was sent to its destination and received on the other end. So that Appellant was aware of the decision of the Evaluation Board. The fact that the fax machine had the wrong date settings does not substantiate Appellant's claim that he did not receive the Fax.**
- 2. The fact that the Appellant was asked with other tenderers to submit 'sample' and**

conduct 'night trials' does not ,in any way imply that the Appellant's bid was definitely technically compliant. The 'samples' and the 'night trials' were an integral part of the technical evaluation in the tendering process. At this stage of the evaluation, the Appellant failed to comply fully with the technical specifications as dictated in Form 10, of the tender document.

3. Most important of all, this Board notes that, since this tender was a "three package tender" and falls under Regulation 83. Appellant failed to object within ten days from the notice of disqualification of his bid as required under Regulation 83. Appellant cannot now object under Regulation 84.

In view of the above this Board opines that the objection raised by the Appellant before this Board is null and void. However, this Board recommends that the deposit paid by Appellant be reimbursed.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancilleri
Member

2 June 2014