

PUBLIC CONTRACTS REVIEW BOARD

Case No. 756

CT 3074/2014

Tender for the Finishing Works at Block F and Outside Areas at the New MCAST Campus, Paola (Compliant with GPP Criteria).

The tender was published on the 29th April 2014. The closing date was the 10th June 2014. The estimated value of the Tender was €1,381,923.67 (Exclusive of VAT).

On the 3rd October 2014 C & C JV filed a letter of objection against the decision of MCAST to the reject its offer as technically non-compliant.

Five (5) tenderers had submitted an offer for this tender.

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 4th November 2014 to discuss the objection.

Present for the hearing were:

C & C JV - Appellant

Mr Stephan Casha	Representative
Mr Ray Cortis	Representative
Mr Johann Farrugia	Representative
Dr Kenneth Grima	Representative

Camray Co Limited - Preferred Bidder

Mr Brian Miller	Representative
Dr Reuben Farrugia	Legal Representative

MCAST - Contracting Authority

Mr Chris Pullicino	Chairperson Evaluation Board
Mr Alexis Inguanez	Member Evaluation Board
Perit Leonard Zammit	Technical Advisor

Department of Contracts

Mr Kevin D'Ugo	Procurement Manager
Dr Franco Agius	Assistant Director

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Dr Kenneth Grima on behalf of appellant joint venture said that his clients were disqualified because they only gave one reply to a clarification asking for two replies. The clarification had been issued because the original clause, 111.9 was not clear enough but the clarification itself had made matters worse because the wording was not clear. This clarification had been sent to all bidders and asked for detailed drawings showing the anchorage detail of the post with the existing walls and the anchorage details for the posts on the existing concrete surface. He said that this was a design and build tender and it was left to bidders to offer what they considered adequate and all they had to submit were the rates. Clause 111.9 explained that the successful bidder would, "*Prior to the commencement of the works the contractor is to submit a method statement signed by an architect and civil engineer outlining how he intends to fix the poles and on completion the contractor is to submit a certificate by the architect and civil engineer that the works were installed in accordance with the method statement.*" This meant that any decision would be taken after the award of the tender. Appellant had offered what he understood; a design with details and the contracting authority would be able to change these after the tender was awarded. He said that the tender requested bidders to supply and install galvanized steel poles of appropriate diameter, 6 meters high ready to fix nylon netting along the ground perimeters and rates had to include complete masonry structure and/or galvanized wall brackets. Appellants had submitted a design and included details of pole anchorage. The tender did not state whether there would be a retaining wall all around the basketball pitch. The plans show that one side there is a retaining wall and appellants showed how the poles would be fixed to this wall. According to the tender, the contracting authority could only change the proposed plans after the tender was adjudicated and before the works started.

Architect Alexis Inguanez on behalf of the contracting authority said that clause 111.9 was clear in that contractors were recommended to visit the site before submitting details in relation to their proposal for fixing the poles. Bidders were asked to familiarize themselves with the site. The tender had to include a detailed method statement of such installation shall be submitted. The clarification letter to appellants clearly stated that what appellants had submitted with the tender was not clear and so they were asked to provide a further detailed drawing showing:

1. the anchorage details of the posts with the existing walls, and
2. the anchorage detail of the posts on the existing concrete surface.

Appellants only submitted the details regarding the anchorage with the walls.

Architect Leonard Zammit, ID No. 259272M, on behalf of the contracting authority, under oath stated and explained that the perimeter of the ground in question was walled for half of the perimeter and had no walls on the other half of the perimeter. The contracting authority wanted fencing around the entire perimeter. The contracting authority asked for a design and build for the system showing details both of how the anchorage with the walls was to be made and the anchorage of the posts where there is no wall. A site meeting was held for bidders and this was explained to the bidders who attended. After the tenders were submitted it was discovered that some of the bids were not clear enough on this and the bidders were asked to clarify. Appellants failed to submit details of the anchorage where there was no retaining wall. Replying to a question by Dr Kenneth Grima, who also showed witness plans,

submitted by appellant, witness stated that from these documents he could see no plans relating to the fixing of posts where no wall existed. He said that clause 111.9 was still valid. When asked to explain the term “rate to include concrete masonry structure” in the Bills of Quantity item 10.3, witness said that during the on site visit it was explained that there would be no retaining 4 course wall constructed around the other two sides of the perimeter. If the design included a retaining wall this had to be lower than 4 courses if bidders chose to erect a wall. He insisted that no new walls were requested by the tender. Bidders had to accept the scenario as it existed at present with no additional walls erected. That was the reason why the clarification asked for two details.

Dr Kenneth Grima explained that his clients had chosen to erect a wall to ensure that the posts were properly fixed. He insisted that the tender stated concrete and masonry. He insisted that the specifications had not been clear and the contracting authority tried to clarify them. There had been no explanation given that the erection of new walls should not be constructed. Since this was a design and build tender, his clients in the interests of safety had incorporated the construction of a wall. The tender wording was ambiguous and vague since rates for masonry were included in the Bills of Quantity.

Architect Leonard Zammit on behalf of the contracting authority explained that the reference to concrete was because where the posts to be fixed to the existing concrete surface, this surface had to be cut out and repaired after the fixing of the posts. Appellant did not explain how the existing floor and membrane would be affected by the posts.

Dr Reuben Farrugia on behalf of the preferred bidder said that his client had understood the tender and had complied totally. It is clear that the appellants did not understand and were now claiming that there was confusion. The award criteria for this tender were the cheapest, administratively and technically compliant offer. In a design and build tender the contracting authority asks bidders to propose a design and it could either accept or reject this design. Once accepted the contractor had to provide that design. Bidders should have attended the site visit enabling them to provide an adequate design. Clause 111.9 asked for bidders to submit a detailed method statement. The only confusion that could arise here was when the method statement had to be submitted. The contracting authority had thus asked for a clarification according to article 29.1 and asked for additional information. This clarification had asked for 4 items:- the anchoring details with existing walls; anchoring details with the existing concrete surface; details and calculations for the posts and certification by a qualified architect. Appellants only submitted one detailed drawing. The clarification had cleared any possible doubts about the erection of new walls. The letter of objection itself is an admission that the appellants did not reply to the second item of the clarification. In a design and build tender, technical compliance had not only to be in the execution but in the design itself.

Dr Kenneth Grima for the appellants claimed that this being a design and build tender, his clients could not be declared non-compliant but that his design was not acceptable to the contracting authority. Appellants followed the instructions.

Architect Alexis Inguanez for the contracting authority said that this was a cheapest compliant bid tender, whether appellants’ design was liked by the contracting authority or not does not come into the decision. The contracting authority had drawn the attention of appellants but one detail was submitted and another detail was not.

At this point the hearing was brought to an end.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 10th October 2014 and also through Appellant's verbal submissions during the hearing held on 4th November 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant, whilst admitting the fact that when asked for two clarifications by the Contracting Authority, he in fact submitted only one clarification. Appellant claims that the wording of the technical specifications was ambiguous and vague. In fact, there were included technical items in the 'Bill of Quantities' which were irrelevant to the tendered works to be carried out;**
- b) Appellant contends that since this was a 'Design and Build' tender, the Contracting Authority could only reject Appellant's design and not consider Appellant's offer as being technically non compliant.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 4th November 2014, in that:

- a) Appellant submitted only one reply to the two clarifications requested by the Contracting Authority. The Contracting Authority maintains that all the technical items or components as listed in the technical specifications, had to be applied in the execution of the tendered works;**
- b) The Contracting Authority contends that it has awarded the tender to the cheapest and fully compliant Bidder.**

Reached the following conclusions:

- 1. This Board opines that when a Contracting Authority requests clarifications from the prospective Bidders, it does so in order to avoid any ambiguity or vagueness in the interpretation of the tender technical requirements. From submissions made during the hearing of this Appeal, it was credibly established that all Bidders were advised to make an 'on site visit', so that all Bidders would be made aware of the surroundings where the tendered works were to be executed. During the 'site visit' each tenderer had the opportunity to raise any clarification regarding what was dictated in the tender document, obviously, prior to submission of the tender. In this regard, Appellant did not avail himself of such a remedial action and it is before this Board that such complaints are made. This Board does not uphold Appellant's contention that the technical specifications as laid out in the tender document were ambiguous and vague;**

2. **With regards to Appellant's second contention, this Board opines that for the works to be executed, the design in any 'Design and Build' tender, should reflect the technical compliance and compliments the verification of same. A technical design should clearly illustrate to the Contracting Authority that the prospective Bidder will abide by the technical specifications as dictated in the tender document. In this regard, it was justifiably technically proved that Appellant's Bid did not meet the Contracting Authority's expectations. In this respect, this Board upholds the Contracting Authority's contention that Appellant's offer was technically non compliant.**

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

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

17 November 2014