

PUBLIC CONTRACTS REVIEW BOARD

Case No. 800

MATS 01/2015

Tender for the Provision, Installation and Commissioning of Two 400 KVA Generators.

The tender was published on the 4th January 2015. The closing date was the 21st January 2015. The estimated value of tender is €70,000 (Exclusive of VAT).

Eight (8) bidders had submitted bids for this tender.

On the 20th March 2015 United Equipment Company (UNEC) Limited filed an objection against the decision of the contracting authority to disqualify its offer as technically non-compliant.

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 21st April 2015 to discuss the objection.

Present for the hearing were:

United Equipment Company Limited

Mr Gilbert Bonnici	Representative
Mr Gilbert Debono	Representative
Dr John L Gauci	Legal Representative

Lexcorp International Limited

Mr George J Gatt	Managing Director
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Malta Air Traffic Services Limited

Mr Mario Azzopardi	Chairperson Evaluation Board
Mr George M Azzopardi	Member Evaluation Board
Mr Jesmond Farrugia	Member
Brig. Carmel Vassallo	Chief Executive Officer
Dr Alex Sciberras	Legal Representative

The Chairman, following a brief introduction, invited appellant's representative to make his submissions on the objection.

Dr John L Gauci on behalf of the appellant said that his client's offer had been the cheapest at €79,000, yet had been discarded because it offered Zinc Phosphating instead of galvanizing the panels of the sound proofing canopy. He contended that the tender document had not specified which type of galvanizing had to be provided, it just said "galvanized". Appellant had provided another type of galvanizing to prevent corrosion, a more modern method. He contended that the scope of the method remained the same that of rust proofing the canopy. The process offered was covered by European certification and Dr Gauci contended that since the product offered by appellant was galvanized and the tender had not specified which process had to be used then appellant's offer was acceptable. He referred to regulation 46.4 of the Public Procurement Regulations which states that products that comply with a European Standard cannot be rejected if the said product's specifications address the performance or functional requirements which the contracting authority has laid down. Therefore he contends that the objection should be accepted.

Dr Alex Sciberras on behalf of the contracting authority said that the tender asked for galvanized canopy and insists that zinc phosphating an object is not the same as galvanizing it; it was a completely different process. Appellant had ticked the yes box (where it stated galvanized or not) and had only explained the process offered after the contracting authority had asked for clarification. The evaluation board had appointed an engineer as a consultant to help in the evaluation process and this engineer had reported that the process offered by appellant was not galvanizing. It is true that according to regulation 46.4 a bidder could offer an equivalent product but, according to the same regulation, the bidder had to declare at the time of making the submission the equivalent process being offered. The appellant had failed to abide with this regulation since no explanation of equivalent process was submitted with the original tender. Even the clarification reply from appellant failed to explain the equivalency of the offer. Dr Alex Sciberras claimed that it is the contracting authority's prerogative to give the specifications of what it required. The bidders had the onus to explain and justify if they offered alternatives. The contracting authority had been advised that the process offered by appellant was not galvanizing and was not according to specifications.

The Chairman wanted to ask some questions to the consultant engineer, but the person, Mr Ronnie Vella had not been asked to be present.

Dr John L. Gauci for appellant insisted that Mr Ronnie Vella be present to answer questions.

At this point the hearing adjourned to the 7th May 2015 in order to hear the evidence of Mr Ronnie Vella.

Second Hearing:

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday 7th May 2015 to continue discussing the objection.

Present for the hearing were the persons attending the first hearing of the 21st April 2015 and Engineer Ronnie Vella for the contracting authority and Dr Glenn Cassar on behalf of the appellant.

Following a brief introduction by the Chairman, Mr Ronnie Vella was asked to take the witness stand to answer questions.

Mr Ronnie Vella, ID No. 1069446M under oath stated that he was an electrical engineer and had advised the evaluation board in assessing this tender. He said that in his opinion only one process could be called galvanizing. He said that the better galvanizing is the hot dip type but there are other types of galvanizing, but in his opinion only the hot dip is the proper galvanizing. He said that zinc phosphating is definitely not galvanizing. Zinc phosphating is generally used as a base coat before painting. Since galvanized metal is not easily painted over, zinc phosphating is used over galvanized steel to enable it to be painted over. Zinc phosphating can be used as a rust inhibitor but it is used mainly as a base before painting. The tender had specifically asked for galvanizing, and zinc phosphating is definitely not galvanizing.

Dr Glenn Cassar, ID No. 95882M on behalf of the appellant, under oath said that there are two types of galvanization – the hot dip and the dry type. Zinc phosphating is a different process that protects metal from rust, it has the same function as galvanizing and the processes protect the surface from corrosion. Both processes are acceptable but it depends on the way each process was applied. He could not say which process he preferred. But the coatings come under a standard ISO 9323. The highest rate is C5 which affords maximum protection. Now both processes can achieve C5 rate. This rate is used on sea based oil-rigs.

Replying to a direct question by the Chairman, Dr Glenn Cassar said that no, you could not offer zinc phosphating when the tender asked for galvanizing. He was a warranted engineer having a doctorate in coatings and surfacing engineering and he is the head of department of metallurgy at the University of Malta. If a product has to be painted, then zinc phosphating is better. The process offered by appellant is very good and he had seen that it was listed as C5 and C4. C5 is very high and the appellant's offer is equal to C5. Replying to questions by Dr Alex Sciberras on behalf of the contracting authority he said that galvanization and zinc phosphating are not the same.

Dr Alex Sciberras on behalf of the contracting authority said that legally, even if it resulted that the processes were the same, the tender specified galvanizing. And both experts heard today agreed that zinc phosphating was not galvanizing. Appellant had declared he was offering galvanizing when ticking the yes box.

The hearing was adjourned to Thursday the 14th May 2015 in order to hear an expert appointed by the Board, Dr Joseph Buhagiar.

Third hearing:

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday 14th May 2015 to continue discussing the objection.

Present for the hearing were the persons attending the first hearing of the 21st April 2015 with the exception of Mr George Gatt on behalf of the preferred bidder, Mr George M Azzopardi and Mr Jesmond Farrugia for the contracting authority.

The Chairman said that the Board had appointed an expert, Doctor, Ing Joseph Buhagiar who had prepared a report that had also been distributed to all the parties. He explained that the expert would be able to answer question.

Dr Joseph Buhagiar, ID No. 131980M, under oath stated that he was an engineer and also had a Doctorate in corrosion. He was a full time lecturer at the University of Malta. Replying to questions by Dr John Gauci said that zinc phosphating can be used as rust proofing only if it is then painted over. Galvanizing is a completely different process. In order to paint the canopy in question, the metal would have to be zinc phosphating before paint, but the function of the zinc phosphating is completely different from galvanizing because it does not offer sacrificial protection. Galvanizing provides this sacrificial protection. This entails the corrosion of the zinc coating in lieu of the iron. He agreed that zinc phosphating uses passivation that is inhibits rusting, but only if it is painted over. If the object is later scratched the galvanizing would still give protection while zinc phosphating does not. Asked whether he agrees that C5 protection offered by the appellant is good enough, Dr Buhagiar said that that would depend on unknown factors, such as the surrounding environment. When it was explained to him that the environment the panel would be used would be the Airport near the Control Tower, he agreed that the zinc phosphating would be adequate. He said that there were different types of galvanizing depending on the density per square meter, or thickness. The tender did not specify a thickness. He said that since the tender required galvanizing as well as painting the probability would be that over the galvanizing, the zinc phosphating would also be used to enable the canopy to be painted. Galvanizing affords three layers of protection – the sacrificial, when scratched; a layer of zinc protects the steel and finally when zinc rusts it re-deposits itself in another area of the steel. Probably the environment does not necessitate C5 level. Zinc phosphating does not offer three-layer protection.

Dr Alex Sciberras for the contracting authority objected to the kind of hypothetical questions being made to the expert witness by the appellant. He insisted that the expert was not comparing the offers made by appellant and the preferred bidder but was stating whether appellant's bid was compliant or not. It was evident that the two products did not give the same results. He agreed that bidders could offer equivalent products but in that case they had the onus to explain their product in detail. This had not been done by the appellant and the contracting authority should not have to investigate different products submitted by bidders to see if they could provide an alternative. The contracting authority wanted the canopy to be galvanized and specifically asked for galvanizing. Appellant should have filed the report prepared by his expert with the bid and not left it for this stage.

Dr John Gauci reiterated that article 46.3 is clear. The contracting authority cannot decide to reject an alternative. He contends that appellant's offer gives the same result and thus the contracting authority cannot reject it.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection, in terms of the "Reasoned Letter of Objection" dated 19th March 2015 and also through the appellant's verbal submissions during the hearings held on 21st April, 7th May and 14th May 2015 had objected to the decision taken by the pertinent authority in that:

- a) The appellant company contends that its offer was unfairly discarded due to the fact that the offered procedure was a "Zinc Phosphating" instead of a "Galvanising" process;**
- b) The appellant maintains that the procedure offered by the latter was a modern system to prevent corrosion and the system would offer the same result as that stipulated in the tender document. In this respect, the appellant maintains that his offer was unfairly discarded by the Contracting Authority;**
- c) The process offered by the Appellant was fully in conformity with the European standards and certifications and the appellant maintains that the Contracting Authority could not refuse an alternative process which conforms with the technical specifications as laid out in the tender document**

Having considered the Contracting Authority's verbal submissions during the hearings held on 21st April, 7th May and 14th May 2015, in that:

- a) The contracting authority maintains that the tender requested "Galvanising" and not "Zinc Phosphating". The process offered by the appellant company was not "Galvanising";**
- b) The contracting authority insists that, in accordance with regulation 46.4 of the Tender Document, the Bidder could offer an alternative product/process but at the same time the Appellant had to submit details of the alternative justifiable equivalency of such a process. In this regard, the appellant did not comply.**

Reached the following conclusions:

- 1. This Board acknowledges the fact from the onset, that its decision has to rely deeply on technical expertise and in this regard this same Board accepted the Appellant's appointed Expert to present his technical opinion on the subject in question. The Appellant's appointed expert was Dr. Glenn Cassar who is a senior lecturer at the Department of Engineering at the University of Malta. From the expert's report and verbal submissions, it was vividly established that the offer indicated by the Appellant is not a process where it can be described as "Galvanising". It was also clearly and technically proved that there are two types of galvanising; the "hot dipped" and "dry". After having heard the Expert's technical version of the facts, this Board justifiably opines that the process indicated by the Appellant was a totally different system from that requested in the tender document;**

2. **During the third hearing of this Appeal, this Board appointed an Independent Technical Expert, namely Dr. Joseph Buhagiar who has a doctorate on “Corrosion”. This Board notes that its appointed expert confirmed that “Zinc Phosphating” is not “Galvanising”. Dr. Buhagiar also confirmed that “Galvanising” is more protective than “Zinc Phosphating”**

In this regard, this Board does not uphold the appellant’s first grievance.

3. **With regards to the Appellant’s second contention, this Board is fully aware of the provisions laid out in Regulation 46.4 of the tender document, whereby the prospective Bidder could offer an equivalent product, however this Board justifiably notes that when a bidder submits an alternative product, the latter had to justify in detail the “Equivalency” of the same product. In this regard it has been credibly established that the appellant failed to provide such information. This Board does not uphold the appellant’s second grievance.**

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

26 May 2015