

PUBLIC CONTRACTS REVIEW BOARD

Case No. 811

SVP 770

Tender for the Supply, Fitting and Installation of Floor/Vinyl Sheeting and Installation of Sanitary Fittings at St Francis Wards 3 & 4 at St Vincent de Paul Residence.

The tender was published on the 16th September 2014. The closing date was the 13th October 2014. The estimated value of tender is €72,000 (Exclusive of VAT).

Three (3) offers had been received for this tender.

On the 28th April 2015 Mark Schembri & Sons Limited filed an objection against the decision of the Contracting Authority to disqualify its tender offer.

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 2nd June 2015 to discuss the objection.

Present for the hearing were:

Mark Schembri & Sons Limited:

Mr Mark Schembri
Dr Peter Fenech

Director
Legal Representative

De Valier Limited:

Mr Reuben Curmi

Representative

St Vincent de Paul Residence:

Mr James Carabott
Ms Lorraine Camilleri
Mr Mario Caruana
Perit Ian Turban

Chairperson Evaluation Board
Secretary Evaluation Board
Member Evaluation Board
Representative

The Chairman made a brief introduction and then he asked the Appellant's representative to make his submissions on the objection.

Dr Peter Fenech for the Appellant said that his client's tender was disqualified because the product it offered did not meet the minimum grade 34 specified by the tender. Inadvertently Appellant realized too late that the specifications had requested Grade 34 while the product offered was Grade 31, to allow Appellant to ask for clarifications. Normally for bathrooms Grade 31 is sufficient. At first Appellant thought that the specifications were mistakenly issued because although the tender was for 6 lots and only gave the specifications for three of these. The lots were D1 to D6 but specs were only given for D1, D3 and D4 and this fact created some doubts. But however the product submitted by the Appellant just the same reached the scope of the requisite. The product would only be used in shower rooms just 2 by 2 meters, which were not classified as having heavy traffic, while Grade 34 requested in the tender was intended for heavy traffic areas. He contended that the product offered by Appellant was purposely made for wet areas, had international standards and was equivalent to the specifications. He contended that according to the European Directive 18/2004, Article 23.4 that states that "*Where a Contracting Authority makes use of the option of referring to the specifications mentioned in paragraph 3(a), it cannot reject a tender on the grounds that the products and services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in his tender to the satisfaction of the Contracting Authority, by whatever appropriate means, that the solutions which he proposes satisfy in an equivalent manner the requirements defined by the technical specifications*", the Contracting Authority should not have disqualified Appellant's tender. The literature submitted with Appellant's tender clearly explained that the product offered was an equivalent solution for shower rooms just 2 by 2 meters.

Mr James Carabott on behalf of the Contracting Authority explained that the tender at page 16 required that the flooring and the wet flooring have to be from Grade 34 to 43. Being technical specifications these fell under note 3 which meant that no rectification was allowed. Appellant had submitted flooring with Grade 31 that was not according to specifications.

Perit Ian Turban on behalf of the Contracting Authority explained that the tender had items D1 D2 etc where some are normal rooms while others are considered as wet areas. The tender asked that for both normal and wet areas the grade would be from 34 to 43. Appellant had offered grade 31 for the wet areas. At St Vincent de Paul you have patients who shuffle their feet when walking and you had 5 patients for each bathroom. This was the reason why grade 34 usually used for heavy traffic was requested. Patients are also accompanied by the nurses and most of them use frames for walking.

Dr Peter Fenech for the Appellant showed Perit Turban some samples, and asked him to confirm that today the parameters were being changed regularly as new materials were developed.

Perit Ian Turban explained that if the sample shown by Dr Fenech was submitted with the tender it would have been disqualified because it was not textured (studded).

Mr Reuben Curmi for the Preferred Bidder said that the tender specifications were clear and the Preferred Bidder had abided with these. He remarked that it was obvious that Grade 31 flooring would cost less than Grade 34.

Dr Peter Fenech for the Appellant said that it was uncontested that Appellant had submitted Grade 31 instead of Grade 24. He contended that the Contracting Authority should have accepted Appellant's bid because of the principle of equivalence. This point had been decided several times by the European Court of Justice and therefore he contended that the Contracting Authority could have asked for clarification.

Mr James Carabott replying to a question by the Chairman said that the literature submitted by Appellant clearly stated that it was Grade 31 while the specifications asked for Grade 34 and since the technical specifications qualified under note 3 no rectification was allowed.

At this point the hearing was closed.

This Board

Having noted the Appellant's objection, in terms of the "Reasoned Letter of Objection" dated 28th April 2015 and also through the Appellant's verbal submissions during the Public Hearing held on 2nd June 2015, had objected to the decision taken by the pertinent authority to disqualify its tender, in that:

- a) The Appellant Company contends that inadvertently it was realised too late that the technical specifications as dictated in the Tender Document asked for grade 34. Since the tender was for 6 lots and only 3 out of these lots were given specifications, the Appellant feels that the submitted grade of 31 would still give the same results;**
- b) The Appellant maintains that his product was in accordance with international standards and in this regard satisfied the dictated requirements of the Tender Document. The literature submitted by the Appellant clearly showed that its offer was an equivalent solution for the tender requirements;**

Having considered the Contracting Authority's verbal submissions during the hearing held on 2nd June 2015, in that:

- a) The Contracting Authority maintains that the technical specifications in the Tender Document clearly stated that grade 34-43 was requested for the wet flooring area. The Appellant's offered a product with a grade of 31. The literature submitted by the Appellant also confirmed that the Appellant's product had a grade of 31.**

Reached the following conclusions:

- 1. With regards to the Appellant's first grievance this Board, from credible submissions made by the Contracting Authority, is justifiably convinced that although the specifications dictated in the Tender Document asked for a grading of 34 to 43 for wet flooring, it was credibly established and confirmed that the Appellant submitted a grading of 31 for the same requisite. This Board also opines that although the tender asked for various components, the assessment of the tender should be regarded as one tender. From credible submissions, this Board is convinced that the Appellant's offer did not meet all the mandatory technical specifications as dictated in the Tender Document. From the technical**

aspect, it was also proved that a grade of 31 would not meet the specifications of a grade 34. During the submissions, it was also credibly and technically justified as to why grade 34 was requested in the Technical Specifications of the Tender Document. In this regard, this Board does not uphold the Appellant's first grievance;

2. With regards to the Appellant's second grievance, this Board is fully aware that when a tenderer offers an alternative product or procedure, the Contracting Authority has the obligation to consider the offer in line with other bids. On the other hand, the same directive clearly and explicitly obliges at the same time, the bidder to justify the equivalent standards being offered. In this regard, it has been credibly established that such justification was not carried out by the Appellant Company. In this regard, this Board does not uphold the Appellant's second contention.

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

8 June 2015