

PUBLIC CONTRACTS REVIEW BOARD

Case No. 826 – CT 3241/2014: Tender for the Restoration of Paved Passageways and Existing Pilasters, Installation of Trellis and Laying Services Pipes in Informal Garden Using Environmentally Sound Materials at Villa Francia Estate, Lija.

The tender was published on the 16th January 2015. The closing date was the 26th February 2015. The estimated value of tender is €348,572.00 (Exclusive of VAT).

Four (4) offers had been received for this tender.

On the 18th May 2015 Capece Construction Limited filed an objection against the decision of the contracting authority to reject their tender for being 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 7th July 2015 to discuss the objection.

Present for the hearing were:

Capece Construction Limited:

Mr Marzio Filippo Capece Minutolo Del Sasso	Representative
Perit Gilbert Buttigieg	Representative
Mr Saviour Xeri	Representative
Mr Kleaven Maniscalco	Representative
Ms Josephine Casabene	Representative
Dr Jonathan de Maria	Legal Representative

Vaults Co Limited:

Mr Ivan Farrugia	Representative
Dr Alessandro Lia	Legal Representative

Restoration Directorate:

Mr Mark Azzopardi	Chairman Evaluation Board
Ms Tabitha Dreyfuss	Member Evaluation Board
Ms Jean Frendo	Member Evaluation Board
Mr Stephen Pulis	Member Evaluation Board
Dr Fiorella Fenech Vella	Legal Representative

Department of Contracts:

Mr Kevin D'Ugo	Procurement Manager
Dr Fiona Cilia Pulis	Legal Representative
Dr Christopher Mizzi	Legal Representative
Dr Franco Agius	Legal Representative

The Chairman made a brief introduction and asked the appellants' representative to make his submissions.

Dr Jonathan de Maria on behalf of the appellant contended that the reason given to appellant for the rejection of its offer was not true; appellant had included the relevant literature. Appellant in fact had also provided literature on another option, Detergente AB57 which is similar but more environmentally friendly. The relevant part of the tender, i.e. this chemical involved, was around €300 out of a tender that was awarded for €466,000.00 that is a small part of the tender. Appellant had not been asked for a clarification and the tender was awarded at over €100,000 over appellant's offer. He contended that the contracting authority's attitude was completely wrong because clarifications should have been asked. He contended that the literature of the ammonium oxalate was submitted and was on the second page of the document submitted.

Mr Marzio Filippo Capece Minutolo del Sasso for the appellant claimed that he had submitted two pages of literature – one page contained information about ammonium carbonate Detergente AB 57, and the second page contained information about the requested ammonium oxalate.

Dr Christopher Mizzi for the Department of contracts raised concerns about the documents filed today by the appellant. He claimed that only the first page had been submitted with the tender document. There were no other pages and no literature for ammonium oxalate.

Mr Mark Azzopardi ID No. 3504678M Chairman of the evaluation board under oath submitted a screen shot of the attachment submitted by the appellant. The board came across "detergente AB 57" and no ammonium oxalate. He confirmed that the other pages were not included in the tender document. Replying to Dr de Maria he said that the system uploads documents on a website and the evaluators have access to the website. He had personally checked the website.

Mr Saviour Scerri ID No 139649M under oath on behalf of the appellant said that he was a geologist. He explained that ammonium bicarbonate is an inorganic material while the oxalate is organic. Both are used for the restoration and consolidation of stone but the bicarbonate is less noxious than oxalate. Replying to Dr Christopher Mizzi he said that the bicarbonate is a detergent and used for cleaning while the oxalate is used more to consolidate. Both are used for the same scope.

Perit Gilbert Buttigieg ID No 63753M on behalf of the appellant under oath explained that ammonium oxalate is used to clean marble and affresci but was toxic. Ammonium Bicarbonate has the same use but is not as much toxic as oxalate. Replying to Dr Mizzi he stated that the tender asked for ammonium oxalate.

Dr Jonathan de Maria for the appellant claimed that the contracting authority had not produced any screen shots as proof that the document was not received. He reiterated that the contracting authority should have chosen the bidder who had offered the same product, which after all only forms €300 out of €466,000 tender, at a price cheaper by about €100,000.

Dr Franco Agius on behalf of the Department of Contracts submitted that the appellant has

alleged that the contracting authority had not produced screen shots but he said that the Public Contracts Review Board has access to all the necessary documentation.

Dr Alessandro Lia claimed that appellant had submitted a different document and then accused the contracting authority for not asking for clarifications. Appellant has also claimed that the contracting authority failed to prove that the document was not submitted, he said that the documents are available to the Board and in any case anyone who makes an allegation has to prove it. Finally he said that since the matter was qualified by note 3, no rectification was permitted.

Dr Jonathan de Maria for the appellant asserted that according to the appellant the document in question had been submitted.

At this point the hearing was closed.

This Board,

Having noted the Appellant’s Objection in terms of the “Reasoned Letter of Objection” dated 18th May 2015 and also through the Appellant’s verbal submissions during the Public Hearing held on the 7th July 2015, had objected to the decision taken by the pertinent Authority, in that:

- a) The Appellant contends that the reason given by the Contracting Authority for rejecting his offer was not just, as appellant did submit the required technical literature regarding ammonium oxalate as dictated in the Tender Document;**
- b) The Appellant maintains that should there have been missing documentation, the Contracting Authority should have asked for clarifications;**
- c) The Appellant contends that since a complete Bill of Quantities was submitted, his offer was “Administratively & Technically” compliant.**

Having considered the Contracting Authority’s “Letter of Reply” dated 30th June 2015 and also verbal submissions during the Public Hearing held on 7th July 2015, in that:

- a) The Contracting Authority maintains that the Appellant did not submit the full Technical Literature and the Appellant failed to submit the literature for “Ammonium Oxalate”. In fact the Appellant sent literature for “Detergente AB 57” only;**

- b) The Contracting Authority contends that the Evaluation Committee could not have asked for a clarification on missing documentation as this would render a rectification;**

- c) The fact that a complete “Bill of Quantities” was submitted by the Appellant, does not in any way qualify the latter’s offer to be fully compliant.**

Reached the following conclusions:

- 1. With regards to the Appellant’s first grievance, this Board, after checking the documentation contained in the Tender file, justifiably confirms that there was no submission by the Appellant with regards to the Technical Literature relating to “Ammonium Oxalate”.**

This Board notes that this mandatory requirement was clearly indicated in item 1.3 of the Tender Document wherein it was vividly requesting “Technical

specificants of “Ammonium Oxalate” consolidant to be employed for the work as outlined in this Document.” In this regard, this Board is credibly convinced that the Technical literature for “Ammonium Oxalate” was not submitted by the Appellant and in this regard, this same Board does not uphold the Appellant’s first contention;

2. With regards to the Appellant’s second grievance, this Board had on many occasions stressed the important “dictum” that, clarifications can only be made by the Evaluation Committee on documentation submitted with the Tender Document and not on missing documentation.

In this particular case, the issue is “missing documentation” and in this regard, this Board justifiably confirms that there was no room for any clarifications, since if such explanations were requested by the Evaluation Committee; this would amount to a rectification, which is not allowable. It is the Tenderer’s onus to ensure that more due diligence is exercised in submitting the information as requested in the Tender Document. In this regard, this Board does not uphold the Appellant’s second grievance;

3. With regards to the Appellant’s third grievance, this Board justifiably maintains that it is not the “Completed Bill of Quantities” which makes a bid “Administratively and Technically Compliant”. There are other numerous factors which must be taken into consideration by the Evaluation Committee during the Adjudication stage. In this regard, this Board does not uphold the Appellant’s argument.

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

21 July 2015