

PUBLIC CONTRACTS REVIEW BOARD

Case No. 889

GN/MPS/DO/2176/2015

Tender for the Dismantling and Demolition of Marsa Power Station and Disposal of the Resulting Material.

The Tender was published on the 5th May 2015. The closing date was on the 10th July 2015. The estimated value of the Tender is €2,000,000.00.

Three (3) offers had been submitted for this Tender.

On the 11th December 2015 Armofer Cinerari Luigi srl, Italia filed an objection against the decision of the Contracting Authority to discard its Tender because it was 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 Thursday the 14th January 2016 to discuss the objection.

Present for the hearing were:

Armofer Cinerari Luigi Srl, Italia:

Ms Federica Delucchi	Representative
Mr Stefano Chiavalon	Representative
Dr Robert Zammit	Legal Representative
Dr Ian Vella Galea	Legal Representative

Salv Bezzina and Sons Limited:

Mr Anthony Bezzina	Representative
Mr Ranier Bezzina	Representative
Dr Duncan Borg Myatt	Legal Representative

Enemalta Plc:

Mr Ivan Bonello	Chairperson Evaluation Board
Mr Robert Schembri	Member Evaluation Board
Dr Erika Grech	Representative
Mr Frederick Azzopardi	Representative
Mr Jonathan Scerri	Representative
Mr Godwin Agius	Representative
Dr Antoine Cremona	Legal Representative

The Chairman made a brief introduction and invited the Appellant's representative to make his submissions.

Dr Ian Vella Galea on behalf of the Appellant asked that the hearing be conducted in English since his client's representative did not speak Maltese. He explained that his client's Tender had been rejected on the basis of clause 16.1 a (iii) because the proof submitted was beyond the five year period requested. He contended that the Appellant had provided this proof to the Contracting Authority. The Tender had been issued in May 2015 and thus the relative period should cover May 2010 to May 2015. The Appellant's proof had been accepted since his Tender had been shortlisted and had conducted negotiations. However, they subsequently received the notice that their Tender had been rejected. Thus the reason for the objection is that the proof had been provided.

Dr Antoine Cremona on behalf of the Contracting Authority claimed that the exclusion of Appellant's offer was because lack of sufficient proof on one of the experience criteria. He referred to page 12 of the Tender article 16.1.a(iii) "*experience as contractor – Documentation to prove that Tenderer or his sub contractors has carried out a dismantling project of similar size and nature in the last 5 years.*"

There was some confusion when interpreting whether the first date should be the date when the Tender was published or the closing date of the latter. In the present case the Tender opened on the 5th May and closed on the 7th July 2015. This means that the relevant experience quoted should be between the 5th May 2010 and the 5th May 2015. This is a negotiated procedure and therefore the bids were preliminary sifted for short listing. Parallel negotiations were then carried out with the sifted bidders. Up to that stage the Contracting Authority relied on the declarations that had been submitted by the bidders themselves.

The Appellant had filled Form 2 which showed at row 4 "Decommissioning Industrie Eridania", a project which was carried out between 2010 and 2013 and thus at face value seems to be within the required time frame and valid. It was then that the negotiations with the Appellant started. However the Tender submissions contained a booklet wherein the same project is said to have been completed between 2008 and 2009 which falls outside the necessary period. The Contracting Authority had asked for clarifications but the reply to this had complicated matters. This consisted of a spreadsheet (shown in Letter of Objection as Doc C which shows in column 3 that the certificates were issued on the 13th February 2010.

Dr Cremona continued that the Contracting Authority had asked the Appellant to submit the relevant invoices and these all show that payments were for 2009 and 2010. This means that the work had been finished in 2010 and so not valid for the present Tender. Also during the negotiations, the Eridiana project was not given priority and was barely mentioned. Instead, Appellant during negotiations focussed on another project. All this shows that there was confusion even after clarification. All that was needed was a certificate clearly stating when the work was performed, as it is all documents submitted by the Appellant showed that it was not compliant and had perforce to be excluded.

Dr Ian Vella Galea for the Appellant claimed that they were going to prove that from the submitted documents they were compliant.

Ms Federica Delucchi, ID document AB6258177, an architect employed with the Appellant under oath, stated that she was the contact person for Appellant in the said Tender. With the Tender, the Appellant had submitted two documents which declared that they had the

necessary experience which is at page 8 of the Tender submission. This showed that the Appellant was responsible for works amounting to €5,300,000.00 to Eridania in the period 2010/2013. The other was Document B which was a general description of the works on that Eridania site. This Document was not prepared for this Tender, but describes a large demolition project. The Contracting Authority in August 2015 had asked for more detailed information about the demolition of the individual parts of the plant.

As a reply, the Appellant provided Doc C which shows at row A7 column 3 the demolition of the large silo; Document D and Document E. These refer to a dismantling of a large sugar factory complete with its own power station called Eridiana. The contract had been signed in 2009 and works started in February 2009 but the demolition works could only start after the Health and Safety authority, Asur Marche, issued the permit on the 16th March 2010. Demolition was in fact started then.

The Document D was issued by the client to certify work done. This refers also to the works in progress as on the 30th April 2010 when Appellant still had to provide €2,800,000 more work after that date. The project was not completed by the 5th May 2010. The list of invoices submitted was a self-certification of work already performed but the works were still in progress on the 5th May 2010.

Ms Delucchi continued that on the 7th September, they had received an email stating that his offer had been shortlisted and invited to submit an improved financial offer as part of negotiated procedures, and after complying was invited to a meeting. This was held on 2nd October 2015 and there discussed several items including the dismantling of the chimneys and the boilers, but was also asked about the Eridiana power station. She had been then asked to provide a list of persons who could provide reference. The Appellant had submitted Doc F which lists the dismantling of items in the Eridiana complex including two large storage tanks.

The Contracting Authority did not ask for a translation of the documents and made no request to Eridania for further information about the demolition. The question of the time validity period had not been raised during the meeting.

Replying to questions by Dr Antoine Cremona who showed her a document, she said that she recognized the document as being part of the Appellant's Tender submission, this was a commercial booklet. He asked her to state the correct date of the project since three different dates form part of the Tender submission. The contract had been signed in 2009 while form 2 states that the project started in 2010 and he asked her to state which date was correct.

She contended that the only legal document was document D which is form 2. She could not state why the date in the booklet/brochure showed the date as 2008. The project was split into lots and Appellant only submitted to Enemalta the relevant parts. The fact that the project was divided into lots was not divulged in the Tender submission. The work started in February 2009. The dates in the original bid – 2010 and 2008 were both wrong.

It was correct to state that the Appellant had been paid 3.4 million. Between the years 2010 and 2013 the demolition of the core of the site was carried out. The Appellant did not provide further invoices because it preferred to give to the Contracting Authority public authority documents and not personal documents. The certificates issued by the documents submitted included the preliminary works and the demolition of other parts of the factory except the power station.

Replying to question by Dr Ian Vella Galea she said that the total value of the project was €5.3 million and this is shown at Document A page 8. Before the authorization was received works done included clearing of site, and preliminary works asbestos removal and demolition of other buildings. After authorization, the works involved the demolition of the power station, fuel tanks and piping.

The project was terminated at the end of 2012 or beginning of 2013. Ms Delucchi had not been asked to explain that the project was split into lots and did not see any reason why the Appellant had to state this. She did not see the need to submit the termination date of the project because Appellant had submitted Document F wherein the engineer had listed the completed works. The witness admitted that the question of sub-contracting had been raised during the meeting. She confirmed that the listed subcontractors had not been consulted before the Tender was submitted.

Mr Frederick Azzopardi ID 152076M under oath said that he agreed that document B was submitted with the Tender. There was an issue however because it was felt that the Contracting Authority could not base its decision on a photocopied brochure. In the Tender was another bound document which stated that the works took place between 2008 and 2009.

The Evaluation Board had first sifted all bidders without going into the financial offer. Then a shortlist was issued of the most likely bidders who were *prima facie* compliant. At a further stage clarifications were sought and negotiations held with the short-listed bidders. During evaluation, the Evaluation Board had sent Document 1 to the Appellant because document D did not provide sufficient proof and because the Evaluation Board did not rely on just 1 document. There were no issues with document E.

From the invoices and the discussions held with Appellant it could be seen that the Evaluation Board was convinced that the work had been finished before 2010. During these discussions instead of focussing on this project, the Appellant gave importance to another project and not to this.

Document F does not give any timeframe and did not mention any dates. During the negotiations Ms Delucchi was asked to specifically give the dates when the project was completed. The Appellant had produced the list of invoices and it was difficult to believe that works carried out in 2010 had been paid in 2009. Replying to questions by Dr Antoine Cremona for the Contracting Authority, witness said that in the Tender file there is no proof whatsoever that the project was terminated.

There is no certification of completion or relative invoices. He also said that there were concerns raised because one of the sub-contractors listed in Appellant's Tender was a person who had also submitted a bid in his own name and was in fact the Recommended Bidder. The Evaluation Board had to examine whether there was some collusion between the parties. However the Recommended Bidder confirmed that he had not been approached by the Appellant to act as his sub-contractor.

At this point the hearing was closed.

This Board,

Having noted the Appellant’s objection, in terms of the “*Reasoned Letter of Objection*” dated 11 December 2015 and also through their verbal submissions during the Public Hearing held on 14 January 2016 had objected to the decision taken by the Pertinent Authority, in that:

- a) The Appellant contends that his offer was rejected because as per clause 16.1 a (iii) of the Tender Document, the experience requested went beyond the “*Five Year Period.*” In this regard, the Appellant maintained that this requirement was submitted and accepted by the Contracting Authority so much so, that their offer was shortlisted;**

- b) The Appellant also maintains that the Evaluation Committee never contested the documentation submitted by the former, in so far as the dates of the “*Five Year Period.*” In this regard, the Appellant contends that he had submitted enough information through the engineer’s certificate marked Doc F wherein all completed works were clearly shown.**

Having considered the Contracting Authority’s “*Letter of Reply*” dated 21 December 2015 and also their verbal submissions during the Public

Hearing held on 14 January 2016 in that:

- a) **With regards to the Appellant's First Contention, the Contracting Authority maintains that since the Tender was published on 5 May 2015, the relevant experience quoted should have been between 5 May 2010 and 5 May 2015 in order to satisfy the Experience requested as per Clause 16.1 a (iii).**

In this regard, according also to the documentation submitted by the Appellant, the works were carried out by the latter did not conform to the period requested.

- b) **The Contracting Authority contends that since this was a “*Negotiated Procedure*”, the bids were preliminarily sifted, (on face value), and short listed. However, on further examination of the documentation and brochures submitted by the Appellant, the latter were confusing and contradicting with regards to the projects carried out within the last five years.**

In this regard, the Contracting Authority had asked for clarifications regarding the matter; however the reply created even more complications, hence the Evaluation Committee could not establish

whether the Appellant satisfied the requested experience for the last five years.

Reached the following conclusion:

1. With regards to the Appellant's First Grievance, this Board, after having examined the relevant documentation submitted by the Appellant and after having heard lengthy submissions by both the Appellant and the Contracting Authority, credibly opines that the main issue is whether the Appellant's offer was compliant with Clause 16.1 a (iii).

This Clause clearly states that *“Experience as a contractor - Documentation to prove that the Tenderer or subcontractors has carried out a dismantling project of similar size and nature in the last 5 years”*.

This Board would credibly opine that if a Tender is published on a particular date, the experience going back to five years should be from this same date and not otherwise. This Board does not, in any justifiable way, accept the argument that the closing date of the Tender should be the date going back 5 years. Therefore, the *“Five Year”* period should go back from 5 May 2015.

At the same instance, this Board credibly notes that, from the relevant documents submitted by the Appellant, confusing and contradictory data was submitted by the latter, in that, various dates were submitted which definitely fall beyond the requested “*Experience Period*”, as dictated in the Tender Document.

This is a “*Real Scenario*” where the information regarding past experience, as dictated in the Tender Document was segmented in a way which rendered the Evaluation Board unable to establish the Administrative and Technical compliancy of a Tender.

The fact that the Appellant’s bid was shortlisted will be treated later on. However, in this regard, this Board credibly does not uphold the Appellant’s First Grievance.

- 2. With regards to the Appellant’s Second Contention, this Board again, after examining the documentation as submitted by the Appellants and after the lengthy submissions of the “*Technical Witness*” summoned by the Appellant (under oath), justifiably contends that, since this Tender entailed a “*Negotiated Procedure*”, the Evaluation Board’s First Duty was to sift “*on a prima facie*” basis who might be**

the likely contenders and then, shortlist the selected bidders, one of which was the Appellant Company.

This Board credibly opines that the fact that the Appellant was “shortlisted” does not necessary imply that the Appellant’s bid was “Administratively and technically compliant.” The procedure to be followed after short listing prospective bids entails the “in depth scrutiny” of all Administrative and Technical compliances as specified in the Tender Document.

In this regard, this Board credibly opines that the Evaluation Committee carried out the Evaluation process in a just and transparent manner.

This Board would justifiably also treat the claim made by the Appellant Company, in that “The Appellant had submitted all the relevant information with regards to “Similar Work Experience” carried out by the appellant for the last Five Years.”

First of all, this Board, after having examined closely the relative documentation as submitted by the Appellant with regards to “Experience” would credibly opine, that the information submitted

by the Appellant was not in line with the requirements of Clause 16.1.a (iii) of the Tender Document.

In this regard, this Board also credibly contends that a prospective bidder has to submit the Technical Information as specifically dictated in the Tender Document, in a clear manner, to enable the Evaluation Committee to adjudicate the offer in a just and transparent manner.

This Board justifiably notes that, the submissions made under oath by the witness summoned by the Appellant, did not render credible proof or evidence that the Appellant Company submitted the requested information regarding the last “*Five Years Experience*” of similar works as dictated in the Tender Document.

With regards to the Witness’ submissions claiming that the Appellant had provided all the information requested through clarifications, this Board, after having examined the replies of these same clarifications sought by the Evaluation Board, opines that confusing dates were given and these submissions were far from “*clear*”, and in fact, this Board opines that, the Evaluation Committee could only assess the Appellant’s offer on the documents submitted which upon

further examination of this documentation, fall short of what was clearly dictated in the Technical Specifications of the Tender Document. In this regard, this Board does not uphold the Appellant's Second Grievance.

- 3. On a general note, this Board had on many occasions expressed its opinion regarding the strict adherence to the Technical Specifications as dictated in the Tender Document. In this particular instance, the Contracting Authority issued a Tender for a specialised kind of works, which includes the dismantling of the Power Station situated at Marsa/Floriana.**

This Board acknowledges the fact that the Tender Document requested clear proof that the bidders had to have experience in similar works in the last five years. From the documentation and submissions made by the Appellant, no evidence or proof was shown to indicate that the latter was compliant with Clause 16.1 a (iii) of the Technical Specifications.

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

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

26 January 2016