

PUBLIC CONTRACTS REVIEW BOARD

Case No. 940 – TM 050/2015: Tender for the Electricity Supply Installation at the Ta'Xbiex S & D Marina.

The Tender was published on the 3rd November 2015. The closing date is on the 20th November 2015. The estimated value of Tender is €93,474.58 (Exclusive of VAT).

Five (5) offers had been received for this Tender.

On the 5th April 2016 Bonnici Brothers Contractors Limited filed a Letter of Objection against the decision of the Contracting Authority to reject their 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 24th May 2016 to discuss the Objection.

Present for the hearing were:

Bonnici Brothers Contractors Limited:

Mr Stephen Borg	Representative
Ms Joanne Azzopardi Bonnici	Representative
Dr John L Gauci	Legal Representative

Raymond Vella & Company Limited:

Mr Raymond Vella	Representative
Dr Norval Desira	Legal Representative

Transport Malta:

Mr Konrad Muscat	Chairperson Evaluation Board
Mr Carmelo Bonanno	Member Evaluation Board
Mr David Penza	Member Evaluation Board
Mr Chris Schembri	Member Evaluation Board
Ms Liz Markham	Representative
Dr Franco Vassallo	Legal Representative

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

Dr John L Gauci on behalf of the Appellants explained that his clients' Tender had been rejected, albeit it was the cheapest offer, because the electrical panel offered, the cost of which amounted to about one tenth of the total Tender value, rated IP 30 instead of the requested IP31. He said the Objection was mainly on two points:

- a) That the Technical Literature clause in the Tender was qualified by note 2 and this meant that the Contracting Authority should have clarified with Appellants and asked them to rectify their literature. It was the Technical Offer that could not be rectified. The latter had to contain a declaration that all the conditions and specifications were adhered to;
- b) Admittedly the submitted literature declared that the MDB offered was IP30, but the Technical Offer was correct and therefore the Contracting Authority should have asked Appellants to rectify the submitted Technical Literature;

Dr Gauci then asked that the Board to hear the testimony of a witness regarding technical matters.

Mr Stephen Buttigieg, ID No. 159771M, an engineer, under oath stated that he had offered Bonnici Brothers Contractors Ltd an electric panel that was 2.2 meters by 1 meter. This was eventually offered by the Appellants in their Tender. Mr Buttigieg explained that the IP rating determines the amount of protection against elements of the panel. In the case of IP31 the number 3 related to protection against dust particles intrusion while the number 1 referred to protection against water proofing of the case. In general terms this means that a panel with IP31 has an extra top strip on top to prevent the intrusion of water vertically dripping from above.

Replying to questions by Dr Franco Vassallo for the Contracting Authority he said that he was aware that the MDB in question needed to be waterproof – IP31 offers protection against vertical droplets of water. In IP30, he stated that the 0 means no water seepage protection while the 1 in IP31 means that there is protection against vertical water seepage.

Dr Franco Vassallo on behalf of the Contracting Authority contended that while the Appellants were claiming that the difference between IP30 and IP31 was minimal and that the Contracting Authority should have asked Appellants to either clarify or rectify their offer, the Tender Document constituted a contract between the Contracting Authority and the bidders. According to clause 7.c (i) of the Tender Document, the latter only allowed the rectification of the submitted literature. It was the bidder who was obliged to offer what the Contracting Authority had requested.

The Appellants' Tender could not be rectified. He also contended that the case cited by the latter in the Letter of Objection for CT 3024/2015, was not decided as Appellant claims. To allow the rectification by Appellants the Contracting Authority would have acted against the decision of the European Court of Justice in the case Commission against Belgium.

Dr John Gauci for the Appellants contended that other European Court of Justice Decisions hold that the Contracting Authority committed no breach of law when it implemented what

was written in the Tender Document. In the present case the Tender Declaration signed by the Appellants confirmed that their offer was according to specifications. He reiterated that his clients' Tender should have been rectified because submitted literature fell under note 2.

Dr Norval Desira on behalf of the Recommended Bidder agreed with Dr Franco Vassallo and said that it was obvious that the witness heard had offered Appellants IP30 and not IP31 and thus the Appellants' offer could not be according to specifications.

Dr Franco Vassallo for the Contracting Authority said that clarifications could be sought when something was not clear; but rectifications meant that a mistake or error had been made and corrected. In the present case the offer was erroneous.

At this point the hearing was closed.

This Board,

Having noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection*" dated 5 April 2016 and also through their verbal submissions during the Public Hearing held on 24 May 2016 had objected to the decision taken by the Pertinent Authority, in that:

- a) Bonnici Brothers Contractors Ltd contend that its offer was discarded due to the fact that, although they were maintaining that the Technical Offer was correct according to the declaration made and which formed part of the Tender Document; the Technical Literature submitted stated that the equipment offered was IP 30 instead of IP 31. In this regard, the Appellants maintain that since their Declaration was correct, the Contracting Authority should have asked for clarification on this issue.**

Having considered the Contracting Authority's "*Letter of Reply*" dated 11 April 2016 and their verbal submissions during the Public Hearing held on 24 May 2016, in that:

- a) Transport Malta was contending that the difference between the Equipment rated IP 30 and that with a rating of IP 31 is not minimal but substantial. The fact that the Appellants submitted Literature with a rating of IP 30 and not IP 31 classified the Appellant's bid as being non-compliant;**

- b) The Contracting Authority maintain that it could not ask for clarifications as the documentation submitted by the Appellant was not up to the standard requested in the Tender Document.**

Reached the following conclusions:

- 1. With regards to the Appellant's Contention, this Board would justifiably deal with the merits under two main headings: The Materiality of the difference between the Equipment rated IP 30 and the same equipment rated IP 31, and also the question of clarification.**

a) **Material Difference**

Following the submissions made under oath by the Appellant's Witness, Mr Stephen Buttigieg, it was vividly confirmed that there is a substantial difference between the equipment rated IP 30 and that with a rating of IP 31, in that IP 31 offers protection against vertical water droplets whilst the equipment offered by the Appellant did not offer this protection.

At the same instance, this Board is also considering the fact that such equipment, although in an enclosed area, will be situated very close to the sea.

This Board, as had on many occasions, stressed the importance and obligation of the prospective bidders to strictly adhere to the Technical Specifications as dictated in the Tender Document. This Board would credibly emphasize this mandatory obligation, as the Technical Specifications in a Tender Document are not capriciously formulated by the Contracting Authority in order for the latter to have the Best Equipment possible under the specific conditions which ensure that the supply of the Tendered

Procurement would satisfy the purpose for which the same equipment is being requested by the Contracting Authority.

In this regard, it was evidently proved that there is a material difference between the Equipment rated IP 30 and the one rated IP 31. This was confirmed justifiably by the submissions made by Transport Malta and re-affirmed by the witness summoned by the Appellants themselves. This shows that the Appellant's Equipment with a rating of IP 30 was not Technically Compliant.

b) Clarification

Bonnici Brothers Contractors Ltd are claiming that since the Technical Specifications were confirmed to be adhered to, through the Declaration made by the Appellant, the Contracting Authority should have sought clarification from the latter.

First of all, this Board would like to credibly confirm that the Literature submitted by the Appellant did in fact stated that the Degree of Protection of the equipment being offered was rated IP 30 and not as dictated in the Tender Document, that is IP 31.

The fact that the Appellant's bid was not Technically Compliant compromised the Contracting Authority's options to seek any clarifications as otherwise such action would have been seen as a rectification of the grading of the Equipment which was already submitted and stated to have a rating of IP 30. In this regard, this Board upholds Transport Malta's decision in both respects treated above.

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

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

27 May 2016