

PUBLIC CONTRACTS REVIEW BOARD

Case 995 – SEWCU/TD/05/2016 – Tender for the Design, Supply, Delivery, Installation, Testing and Commissioning of Electrical Power and Lighting, Extra Low Voltage (ELV) and Fire Systems at WSC SEWCU Premises, Luqa.

The Publication Date of the Call for Tenders was 28 June 2016 whilst the Closing Date for Call of Tenders was 19 July 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 40,000.

Four (4) Bidders have submitted offers for this Tender.

On 25 August 2016, Raymond Vella & Co Ltd filed an Objection against the decision of the Sustainable Energy and Water Conservation Unit to award the Tender to Bonnici Bros Service Ltd for the price of € 59,687.49 (Exclusive of VAT) against a deposit of € 400.

On 18 October 2016, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Raymond Vella & Co Ltd

Mr Raymond Vella	Representative
Dr Norval Desira	Legal Representative

Recommended Bidder – Bonnici Bros Services Ltd

Ing Joanne Azzopardi Bonnici	Representative
Dr Ruth Ellul	Legal Representative
Dr John Gauci	Legal Representative

Contracting Authority – Sustainable Energy and Water Conservation Unit

Ms Elysia Camilleri	Secretary, Evaluation Board
Mr Aaron Cutajar	Member, Evaluation Board
Ing Albert Farrugia	Member, Evaluation Board
Ms Therese Galea	Member, Evaluation Board
Ing John Chircop	Representative
Mr Maurizio Schembri	Representative
Dr Katrina Borg Cardona	Legal Representative

Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Norval Desira, Legal Representative for Raymond Vella & Company Ltd, said that this contract was a unit price contract. In this contract, there was only indicated that the duration of the works was 8 weeks and that a Bill of Quantity had to be filled up. Here there was a situation where the programme of how the contract was to be worked out was unknown to the Bidders.

Dr Desira referred to Clause 1.14 of the Bills of Quantity which said, *“Allow for the provision to perform works after office hours (after 17:00) and/or during weekends/public holidays for certain works as and when indicated by the Projected Manager”*. The Contracting Authority was pretending the Bidders to submit a lump sum without knowing the works programme, which would let the latter, know how much workers were needed to eventually complete the works.

In their appeal, Raymond Vella & Co Ltd were explaining how this should have been worked because if you compare their bid less the quantity requested for Clause 1.14 and the Recommended Bidder's bid there was a 100 hour difference for two workers. In the unit price contract, the Contracting Authority had every right to make their own calculations because if 100 or less extra hours were needed, his client's offer would then be the most advantageous added Dr Desira.

Dr Katrina Borg Cardona, Legal Representative for the Sustainable Energy and Water Conservation Unit, contended that with regards the unit price contract, the latter indicated that the offer did not require a lump sum but rates were to be submitted according to the Bill of Quantity.

With regards to the Programme of Works, Dr Borg Cardona argued that there was a site visit for which even the Appellants were present for it, where all Bidders could get an idea of what the works consisted for and the Appellant could have sought for a clarification if he felt that there were points in the Tender which were not clear for him.

It was not the onus of the Contracting Authority to make out the calculations on the basis of assumptions and speculations according to the global sum which the Bidders have submitted but it was the onus of the latter to give the rates according to what did the Contracting Authority requested.

Ing John Chircop, for the Sustainable Energy and Water Conservation Unit added that with regards the 100 hours mentioned by the Appellant, these calculations were made after the opening of the Tenders. The prices at that stage could not have been adjusted and the Contracting Authority could neither know nor assume that there were 100 hours.

With regards to the unit price, if the Contracting Authority wanted a lump sum, they would not have requested a Bill of Quantity while with regards the Clarification Issue, Ing Chircop continued by saying that actually a rectification was needed but could not have been requested under Note 3 of Clause 7.1 (d) of the Tender Document.

Mr Carmel Esposito, Member Public Contracts Review Board, asked whether the lump sum included these amounts for which Ing John Chircop for the Contracting Authority replied that

the Bill of Quantity was itemised and some items were required specialised rates while others requested a lump sum.

Mr Carmel Esposito, Member Public Contracts Review Board, then requested whether the Total Price included the amounts submitted by Raymond Vella & Co Ltd for which Ing John Chircop for the Contracting Authority replied that for some items one could not issue a fixed price since the amount was a variable one.

Dr Norval Desira, Legal Representative of Raymond Vella & Co Ltd said that the Contracting Authority was making contradicting statements which was strengthening their position. If the Contracting Authority, who wrote the Tender did not know for how much hours were the works needed, how did the Appellant had to know how much hours were needed then, Dr Desira wondered.

In the Tender, the maximum hours requested by the Project Manager should have been requested. On the other hand, continued Dr Desira, it was not true that the Appellants wanted to adjust the price. The Contracting Authority was supposed to know how much hours were needed in order for the contingency expenses to be calculated.

Raymond Vella & Co Ltd could not enter immediately for these works anyway since there were other incumbents at the moment. Dr Desira continued by saying that his clients were not requesting to make any rectifications and was inviting the Public Contracts Review Board to consider whether the Sustainable Energy and Water Conservation Unit was correct in their Evaluations.

Ing John Chircop for the Contracting Authority said that it was up to the Appellant to plan how much workers, normal and overtime was needed to complete the works.

Dr John Gauci for Bonnici Bros Services Ltd said that here we have a case of a Bidder who out of his own will decided to amend a Bill of Quantity from a lump sum to an itemised one. If the Appellant had doubts on how reasonable the Contracting Authority was in issuing this Tender, he should have filed a Pre-Contractual Concern at an earlier stage.

Dr Gauci continued that he was sure that the Sustainable Energy and Water Conservation Unit abided by the letter of the Law and the Tender Document which at this stage, the Public Contracts Review Board had to do as well.

At this stage, the Public Hearing was closed.

This Board,

Having noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection*" dated 25 August 2016 and also through their verbal submissions

during the Public Hearing held on 18 October 2016 had objected to the decision taken by the Pertinent Authority, in that:

- a) Raymond Vella & Company Ltd contends that the Tendered Works consisted of works which could not be properly assessed by the Contracting Authority. In this regard, in its quoted price, where the number of hours which had to be taken was not known, the Appellant quoted a rate per hour instead of a lump sum and in this respect, his offer was rejected.

Having considered the Contracting Authority's "*Letter of Reply*" dated 2 September 2016 and also their verbal submission during the Public Hearing held on 18 October 2016, in that:

- a) The Sustainable Energy and Water Conservation Unit contend that the purpose of the site visit was to enable the Bidders to assess themselves what was needed to complete the Tendered Works in a period of eight (8) weeks.

In this regard, the Contracting Authority maintains that if the Appellant was in doubt about the mode of his offer, he should have sought clarifications or other remedies available at law.

Reached the following conclusions:

- 1. This Board, after having heard the submissions made by the parties concerned and having also examined the relative documentation, opines that prior to the submission of the Tender, all Bidders were invited for a site visit.**

It is quite obvious that the purpose of this visit was to give a “*Hands On*” opportunity for all Bidders to assess the situation and the works being requested in the specified duration of eight weeks.

This Board justifiably opines, that all the Bidders were well accustomed to this particular assignment so that by knowing what works are being requested and the time frame available for these works, prospective bidders were well aware of the situation and could assess what was involved in the said works.

The Tender Document requested a lump sum figure for the said works, which was possible and practical for any bidder in the Trade, to quote as requested in the Tender Document.

Raymond Vella & Company Ltd did not abide by this condition and therefore no comparison with the other bids who quoted the lump sum could be made by the Evaluation Board.

The onus of quoting a lump sum, which had a specific purpose to be quoted in that form, was on the Bidder and not on the Contracting Authority.

In this respect, the Bidder was given a “*First Hand*” opportunity to enable him to formulate the approximate costs, since he knew beforehand of the works involved and duration for completion of the works.

This Board is also convinced that such bidders to this particular Tender are well versed in their trade and therefore are more than capable to formulate a lump sum figure for all the Tendered works.

- 2. This Board credibly notes that issues, such as this one, are being raised in front of this Board for a solution. Such issues could have been easily remedied through Clarifications prior to the submission of the Tender Documentation.**

There was also the opportunity for the Appellant to raise a Pre-Contractual concern should the need arises. In all these circumstances, Raymond Vella & Co Ltd did not avail itself of such legal remedies.

In this regard, this Board opines that enough opportunity and detailed information was made available for the Appellant to quote a lump sum fee for the Tendered Works.

In view of the above, this Board finds against Raymond Vella & Co Ltd and recommends that the deposit paid by the latter should not be refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

25 October 2016