

PUBLIC CONTRACTS REVIEW BOARD

Case 1208 – PA5.0103/14.1 – The Restoration of the Facade of the Church of the Annunciation (Parish Church) Tarxien

The publication date of the call for tenders was the 21st May 2018 whilst the closing date of the call for tenders was the 25th June 2018. The estimated value of the tender (exclusive of VAT) was € 127,118

On the 13th August 2018, The Restoration and Conservation Co-operative Ltd (ReCoop) filed an appeal against Fondazzjoni Għall-Patrimonju Kulturali Tal-Arcidjocesi ta Malta (Fondazzjoni) as Contracting Authority on being disqualified on the grounds that their bid was not technically compliant. A deposit of € 659.16 was paid.

There were four (4) bidders.

On 13th September 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – ReCoop Ltd

Dr John L Gauci	Legal Representative
Dr Ruth Ellul	Legal Representative
Mr Clayton Bonello	Representative

Contracting Authority – Fondazzjoni għall-Patrimonju Kulturali tal-Arcidjoçesi ta' Malta

Dr Dominic Cassar	Legal Representative
Mr Michael Pace Ross	Chairperson Evaluation Board
Mr Raymond Bonnici	Member Evaluation Board
Arch. Jesmond Mugliett	Member Evaluation Board

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and asked Appellants to make their submissions.

Dr John Gauci, Legal Representative for ReCoop stated that the appeal was based on the letter received from the Fondazzjoni dated 3rd August 2108 stating that Appellants' offer was technically non-compliant as the Specifications of Materials to be used during works on the Tarxien Parish Church were not submitted. It was a fact that no document called specifications of materials was submitted – however, what was supplied was a detailed statement of the works to

be carried out linked to the materials to be used in the process. It was acknowledged by the Contracting Authority that the information supplied, albeit not in the format expected, made reference to the materials to be used. Dr Gauci made reference to a previous PCRB Case confirmed by the Court of Appeal, (235/2018), wherein it was held that requested information did not necessarily have to be in the specified format. The Tender technical offer (point 5) stated that technical literature might be requested – no such request was made at evaluation stage.

Architect Jesmond Mugliett said that he was a member of the Evaluation Board and held the view that the Board was not trying to be too strict or trying to exclude any bidder but was merely trying to ensure that the bids submitted satisfied the requirements. The types of materials to be used in this project were critical due to the historical sensitivity of the building. Other bidders had supplied a detailed list of materials except ReCoop, and therefore it was unclear what materials they would be using. Materials had been mentioned by bidder in the statement of works but the information was dispersed. No clarification was possible as no technical literature had been submitted.

Dr Dominic Cassar, Legal Representative of the Fondazzjoni, said that it was up to this Board to decide if the information submitted was sufficient. It was difficult for the Evaluation Board to decide whether to clarify the details supplied or ask for missing documents. The Tender sought a commitment on the materials to be used and this is what the Authority was looking for. The lack of specific details, as requested, would make the whole contract unenforceable.

In reply to questions from the Chairman, Architect Mugliett confirmed that details of materials had been supplied but they were dispersed over some 30 pages outlining the stages of work and one had to search for them, but it was possible to identify the materials to be used.

Dr Gauci re-iterated that no request for literature had been made at the tender stage, and the information supplied by Appellants was as binding, in tender terms, as much as a separate list of materials.

In reply to a final question from the Chairman asking if this was a case of missing information or whether enough details had been provided to enable the tender to proceed, Architect Mugliett confirmed that there was enough information to proceed.

The Chairman thanked both parties for their submissions and declared the hearing closed.

This Board,

having noted this Objection filed by ReCoop Limited, (hereinafter referred to as the Appellants) on 13 August 2018, which is referring to the contentions made by the same Appellants with regards to the award of Tender of Reference PS5. 0103/14.1 awarded by Fondazzjoni għall-Patrimonju Kulturali tal-Arċidjoċesi ta'Malta, listed as Case No 1208 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr John Gauci

Appearing for the Contracting Authority: Dr Dominic Cassar.

Whereby, the Appellants contend that:

- a) their offer was rejected due to the allegations made by the Foundation that they failed to indicate the specifications of the materials to be utilized during the Tender works. In this regard, the Appellants maintain that they had specified in detail, the types of materials to be used in their detailed statement of the works. At the same instance, ReCoop Limited insists that the Authority could have requested the Technical Literature of the materials; however, no such request was made by same.**

This Board has also noted the Contracting Authority’s “*Letter of Reply*” dated 22 August 2018 and also its verbal submissions during the Public Hearing which was held on 13 September 2018, in that:

- a) The Contracting Authority contends that the information which the Appellants submitted regarding the materials to be applied during the works, was dispersed, so that it was not possible for the Evaluation Committee to determine whether the types of materials as indicated by ReCoop Limited complied with the requirements of those stated in the Tender Dossier.**

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, opines that the issue to be considered is the submission made by ReCoop Limited with regards to the details of materials to be applied during the execution of the works.

First of all, this Board would emphasize the importance which should be given by the Bidders, in their submissions of offers. At the same instance, one should acknowledge that the Technical Specifications are not dictated capriciously but rather stipulated to achieve the Contracting Authority’s desired results.

In this particular case, quite appropriately, the Foundation stipulated particular types of materials that must be applied during the execution of these works. In this regard, this Board notes that although the Tender Document did specify the types of materials requested, there was no specific mandatory form which had to be completed and without which it would have been impossible to establish the type of materials which are being offered by the Bidder.

At the same instance, this Board noted the Contracting Authority's submissions in that, the details of materials had been supplied by the Appellants but they were dispersed. At this stage of consideration, this Board would respectfully point out that if the Evaluation Committee were convinced that the information regarding the type of materials was, in fact, submitted but not collated in a manner which could be easily determined, the latter should have requested the technical literature of the Appellants' proposed materials. By doing so, the Contracting Authority would not have created any advantage to the Appellants but rather ensured that what the latter were offering was in accordance with the correct specifications. This Board considered substantially the Foundation's architect's confirmation that enough details were provided by the Appellants for the evaluating process to continue.

On a concluding note, this Board would point out that from the evidence provided by the Contracting Authority itself, this Board is convinced that although the details of the materials offered by the Appellants were dispersed and perhaps somewhat laborious to collate, the requested information was submitted but in an inordinate manner. This Board would apply the principle of substance over form, and therefore, in view of the above:

- i) does not uphold the Foundation's decision in the award of the contract;**
- ii) recommends that Recoop Limited's offer is to be re-integrated in the evaluation process;**
- iii) orders the Evaluation Committee to clearly determine whether the Appellants' offered materials, (after submitting their technical literature), is in accordance with the specifications so dictated in the Tender Dossier;**
- iv) recommends that the deposit paid by the Appellants is to be fully refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

25th September 2018