

PUBLIC CONTRACTS REVIEW BOARD

Case 1235 – FLC 10/2018 –Tender for the Supply and Delivery only of Decorative Luminaires

The publication date of the call for tenders was the 7th September 2018 whilst the closing date of the call for tenders was 5th October 2018. The estimated value of the tender (exclusive of VAT) was € 36,000.

On the 1st November 2018 Calleja Ltd filed an appeal against Fontana Local Council as Contracting Authority objecting to being disqualified on the grounds that their offer was not compliant. A deposit of € 400 was paid.

There were three (3) bidders.

On 27th November 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Calleja Ltd

Mr Stephen Calleja	Representative
Eng Anthony Magro	Representative

Contracting Authority – Fontana Local Council

Dr Jean Paul Grech	Legal Representative
Mr William Sultana	Chairman Evaluation Committee
Mr Saviour Borg	Representative
Ms Manolita Farrugia	Representative
Eng Mario Cauchi	Representative
Mr Daniel Galea	Representative

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

Mr Stephen Calleja Representative of Calleja Ltd, said that his Company had been disqualified on two counts, namely that the design submitted was not classic and the luminaire was not finished in aluminium covered in polyester coating. He confirmed that the material of the fittings was aluminium. As far as the coating was concerned he mentioned that the paint suppliers'

specification sheet was not submitted at the tendering stage, as it was not available, but once submitted it showed that the finish was powder coating. The matter of the design was purely subjective and the Contracting Authority had not provided any designs indicating what they had in mind by the term 'classic'. It was also a fact that the Local Council had not permitted multiple tenders and there was therefore a limited option that one could offer.

Dr Jean Paul Grech Legal Representative for the Fontana Local Council stated that the lack of a facility to submit multiple tenders was not grounds for appeal. The Contracting Authority has discretion in the choice of design – the PCRB function was to ensure that the terms of the tender were followed not to judge the designs, which was a subjective matter anyway. The Council's view was that the design submitted by bidder was more 'modern' than 'classic' and there was no basis to disturb their decision. Regarding the paint finishes, the Council had, even before the later submission of the paint details, enough literature to make a decision and there is not a sufficient reason to change that decision. Section 4.1.0 of the technical specifications stated that the finish shall be in a dark grey or black epoxy coating and the tenderer was obliged to follow exactly that.

Mr Calleja said that there was a contradiction in the specification of the paint finish requirements. The technical specifications, referred to a 'graphite grey polyester coating' in one place and 'dark grey or black textured epoxy coating' in another place. This he contended is misleading as epoxy painting is a two-pack spray process whilst polyester coating is produced by applying powder to the aluminium and which through a process of baking turns to a paint coating. The two processes are totally different.

Engineer Mario Cauchi (24187G) called as a witness by the Chairman testified on oath that there is a difference between graphite grey polyester coating and epoxy finishes.

The Chairman reminded the Contracting Authority of the principle that technical specifications had to be clear, unambiguous and understandable to avoid confusion on the part of the bidders. He then thanked the parties for their submissions and declared the hearing closed.

This Board,

having noted this Objection filed by Calleja Limited, (hereinafter also referred to as the Appellants) on 1 November 2018, refers to the contentions

made by the latter with regards to the award of Tender of reference FLC 10/2018 listed as Case No 1235 in the records of the Public Contracts Review Board, awarded by Kunsill Lokali Fontana, (hereinafter also referred to as the Contracting Authority).

Appearing for the Appellants: Mr Stephen Calleja

Appearing for the Contracting Authority: Dr Jean Paul Grech

Whereby, the Appellants contend that:

a) Their offer was discarded on two alleged counts, namely:

i) that the product was not in a classic design. In this regard, they contend that this issue is very subjective and should not form an objective reason for the discarding of their offer since no specific design was indicated in the Tender Document;

ii) that their product was not coated as per technical specifications.

In this respect, the Appellants insist that their product meets the

requested specifications, apart from the fact that the specifications with regards to the paint finish are contradictory.

This Board also noted the Contracting Authority’s “*Reasoned Letter of Reply*” dated 5 November 2018 and its verbal submissions during the Public Hearing held on 27 November 2018, in that:

a) Kunsill Lokali Fontana insists that it has all the discretion to choose which design is the most suitable for the installation of the requested product and in this respect, Calleja Limited’s submission was deemed by the Evaluation Committee to be less suitable than that of the Recommended Bidder;

b) with regards to the materials and its paint coating, the Appellants’ submitted literature which showed that the product was not covered in polyester coating, thus being technically non-compliant.

This same Board has also noted the testimony of the witness, namely, Engineer Mario Cauchi, whom it has duly summoned.

This Board, after having examined the relative documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the witness, opines that the issues which deserve due consideration are twofold namely:

- 1. The Design of the Product;**
- 2. The Paint Coating of the Product;**

1. The Design of the Product

With regards to Calleja Limited’s first contention, this Board would respectfully refer to Section 4 – Technical Specifications of the Tender Document wherein details of the “*luminaires for exterior mounted installation*” are dictated.

This Board notes that the only indication given with respect to the design is that, the latter has to be:

“Ornamental decorative type classic design”

This description applies both to “*luminaires*” and “*bracket arm*”. This Board opines that what constitutes an ornamental and classic design is highly subjective and unascertainable, as such taste of design depends substantially on the personal tastes of each member of the Evaluation Board.

On the other hand, if one had to be more objective, it would have been more proper for Kunsill Lokali Fontana to describe, in a clear manner, the location or site where the product is to be installed so that the prospective bidders would have an idea of the surroundings and the design of the product which goes with the particular habitat. In this respect, this Board notes that the Contracting Authority did not invite prospective Bidders for site visits, so that those Tenderers who are not familiar with the location and streets’ configuration were at a disadvantage. In this regard, this Board is not convinced that the Tender Document provided sufficient details as to what constitutes an ornamental and classic design to enable the Bidders to submit offers in a more equitable and suitable manner. It is an acknowledgeable presumption that the Contracting Authority has the final discretion

about the choice of the design however, such discretion must be based on the basic principles of Public Procurement, namely, transparency, equal treatment and proportionality and this Board is not credibly convinced that such principles were applied during Evaluation Stage, and therefore, this same Board upholds Calleja Limited's first grievance.

2. Coating Finish of the Product

Again, this board would respectfully refer to Section 4 – Technical Specifications, of the Tender Dossier wherein in Paragraph 1 it was stated that,

“The luminaires shall be suitable for wall mounting and shall be finished in graphite grey polyester coating”

At the same instance, this Board was made aware of another paragraph referring to the same luminaires, having the following specifications:

“to be finished in a dark grey or black textured epoxy coating”

The two descriptive technical specifications are somewhat contradictory and confusing and through the testimony of Eng Mario Cauchi, this Board confirms that there is a difference between graphite grey polyester coating and epoxy finishes.

In this regard, this Board would respectfully remind Kunsill Lokali Fontana that the technical specifications in a Tender Document should abide, in all respects, with the following criteria:

- Be precise in the way they describe the requirements;**
- Be easily understood by the prospective bidders;**
- Have clearly defined, achievable and measurable objectives;**
- Provide sufficient detailed information that allows bidders to submit realistic offers.**

In conclusion, this Board's remit is to ensure that the tendering process of this particular tender was conducted in a transparent and equitable manner, however, from submissions and testimony of the witness, this

Board is not comfortably convinced that the principles safeguarding Public Procurement have been properly adhered to.

In view of the above, this Board,

- i) does not uphold Kunsill Lokali Fontana's decision in the award of the Tender;**
- ii) upholds Calleja Limited's contention that the design issue of the product is highly subjective;**
- iii) instructs the Contracting Authority to cancel the Tender;**
- iv) instructs Kunsill Lokali Fontana to provide adequate indications of the technical specifications of the product being requested and provide opportunities for prospective bidders to fully understand what is meant by ornamental and classical design and to organise site visits of the location where the product is to be installed;**

v) recommends that the deposit paid by Calleja Limited is to be fully refunded.

Dr Anthony Cassar
Chairman

Mr Carmel Esposito
Member

Mr Lawrence Ancilleri
Member

4th December 2018