

PUBLIC CONTRACTS REVIEW BOARD

Case 1064 – CT 2069/2017 – Negotiated Procedure Tender for the Conversion to High Energy Efficiency Standards of Premises in Kirkop Malta Into a Health Centre Using Environmentally Friendly Construction Materials and Products

The Publication Date of the Call for Tenders was 4 April 2017 whilst the Closing Date for Call of Tenders was 18 April 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 472,592.87.

Two (2) Bidders have submitted offers for this Tender.

On 29 May 2017, LBV Ltd filed an Objection against the decision of the Central Procurement & Supplies Unit to award the Tender to V & M Turnkey Ltd for the price of € 499,737.20 (Exclusive of VAT) against a deposit of € 2,363.

On 11 July 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – LBV Ltd

Mr Justin Attard	Representative
Dr John Bonello	Legal Representative

Recommended Bidder – V & M Turnkey Ltd

Mr Michael Cardona	Representative
Mr Lawrence Vassallo	Representative
Dr Martina Pace	Legal Representative
Dr Matthew Paris	Legal Representative

Contracting Authority – Central Procurement and Supplies Unit

Ing Stephen Borg	Member, Evaluation Board
Ing Stephen Ellul	Member, Evaluation Board
Ing Martin Zammit	Member, Evaluation Board
Ms Karen Scicluna	Representative

Department of Contracts

Dr Franco Agius	Legal Representative
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Dr Anthony Cassar, the Chairman of the Public Contracts Review Board opened by announcing that since the documents relating to the case which enabled the same Board to prepare for the Public Hearing arrived only at 7.30 in the morning of the latter, the sitting cannot be held.

Dr Cassar continued by saying that the Public Contracts Review Board has sent five reminders for the file to be submitted and apologised on behalf of the Public Contracts Review Board for the inconveniences caused to all parties concerned.

The Chairman of the Public Contracts Review Board continued by saying that one cannot prepare for a Public Hearing with the file being submitted at 7.30 in the morning of the same and without any documents being studied on why the Appeal was made.

At this stage, the Chairman of the Public Contracts Review Board summoned Mr Antonello Abela, the Principal Officer within the same Board, holding ID Card 309084 M to testify under oath before the same Board.

Following Mr Abela's testimony, Dr Franco Agius, the Legal Representative for the Department of Contracts, was not contesting the Public Contracts Review Board's complaints but he felt that there were witnesses available who can testify in the context of the Tender Document.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board replied that the context at this point was why there was no feedback to the constant reminders sent by the Secretariat from the Department of Contracts.

Dr Franco Agius, the Legal Representative for the Department of Contracts replied that the circumstances were that he has spoken to the official in question, who happened to be on Vacation Leave and he thought that the Public Hearing in question was for next Thursday 13 July. There was a misunderstanding from the official in question. From the Contracting Authority's side though there was an engineer who can testify if the need arises.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board insisted that this Board could not hear the case without being suitably prepared. He continued by saying that the Public Contracts Review Board felt that the Department of Contracts should have sent a reply when the reminders were sent

Dr Franco Agius, the Legal Representative for the Department of Contracts said that there were circumstances which he could argue about but that he didn't want to enter into them at this stage.

Dr John Bonello, the Legal Representative for LBV Ltd added that the Appeal was a technical one and that his client was going to submit to the Public Contracts Review Board's wishes.

Mr Lawrence Ancilleri, a member of the Public Contracts Review Board insisted that this Board had to be suitably prepared for the case.

Dr Matthew Paris, the Legal Representative for V & M Turnkey Ltd submitted a Letter expressing his client's interest in the proceedings of this Appeal and requested whether all parties can agree on a date on when proceedings were to resume.

Dr Franco Agius, the Legal Representative for the Department of Contracts asked whether all documents were now submitted for which Dr Anthony Cassar, the Chairman of the Public Contracts Review Board replied that the Reasoned Letter of Reply which was supposedly to be submitted by the Central Procurement and Supplies Unit and the Department of Contracts was still missing.

At this stage, the Public Hearing was adjourned to Thursday 13 July 2017.

Second Hearing

On 13 July 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members re-convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – LBV Ltd

Mr Justin Attard	Representative
Dr John Bonello	Legal Representative

Recommended Bidder – V & M Turnkey Ltd

Mr Michael Cardona	Representative
Mr Lawrence Vassallo	Representative
Dr Martina Pace	Legal Representative
Dr Matthew Paris	Legal Representative
Dr Maria Chiara Zappala'	Legal Representative

Contracting Authority – Central Procurement and Supplies Unit

Ms Rita Tirchett	Secretary, Evaluation Board
Ing Stephen Borg	Member, Evaluation Board
Ing Stephen Ellul	Member, Evaluation Board
Ing Martin Zammit	Member, Evaluation Board
Ms Krystle Refalo	Representative

Department of Contracts

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

Dr John Bonello, the Legal Representative for LBV Ltd opened by saying that this was an Appeal from a Tender that behind here there were some background stories which he felt that it was important for the Public Contracts Review Board to get to know about.

Some time ago, a normal Tender was issued for works to be made in a Government building at Kirkop. The works were of a Technical Nature. Three Bidders have submitted offers for this Tender which were all disqualified following a Letter of Cancellation sent to each Bidder with the reasons why each Bid was rejected issued on 2 March 2017.

Sometime later, the Central Procurement and Supplies Unit started a Negotiation Procedure, with the contents of it being the same as the previous one issued. The offers were also submitted by the same three Bidders who submitted offers in the first Tender. One therefore understood that what was good for the first Tender was to be good for the Negotiated Procedure.

Dr Bonello continued by saying that despite the fact that his client's Bid was the cheapest one by a wide margin, the Tender was awarded to another Bidder. The Appellant's Legal Representative at this stage pointed out that the price determines usually who is to be awarded the Tender in a Negotiated Procedure.

LBV Ltd's offer was discarded on two grounds as per Letter of Rejection issued on 18 May 2017 by the Department of Contracts. Both reasons were of a technical nature. Dr Bonello then proceeded to quote from this same Letter which *inter alia* said,

“With reference to item 1.18 AHU-1, of the Literature List, the Bidder is offering an AHU not up to specifications since from the Literature submitted it could not be verified and established that the AHU offered incorporates ‘an inbuilt recuperator as per clause 5.1A of the Tender Dossier regarding ventilation system which stipulates that “the AHU shall incorporate a recuperator, consisting in a plate heating exchanger, in aluminium complete with removable panel filters””

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that the discussion should centre the Literature submitted whilst Dr Christopher Mizzi, the Legal Representative for the Public Contracts Review Board added that the main subject was a particular item in the Tender.

Dr John Bonello, the Legal Representative for LBV Ltd said that he was informed that the item in question was totally compliant. From the documentation which was submitted it resulted that this AHU was compliant with what was requested. Besides the Technical Literature made it clear that all apparatus submitted was compliant with the requirements requested by the European Union regarding air conditioning.

Dr Bonello continued by saying that the second reason why his client's offer was discarded was item 1.28 which was the Hydro Box Unit. Effectively this was already offered in the previous Tender and was also one of the reasons why the Appellants were disqualified then. The Specifications did not change between the two Tenders so essentially this was the same object which was offered in the previous Tenders.

Dr John Bonello then quoted another part of the Letter of Rejection issued by the Department of Contracts on 18 May 2017 which *inter alia* said,

“With reference to item 1.28 Hydro Box Unit 1 of the Literature List, the Bidder is offering a unit incorporating an inbuilt compressor implying that the unit is not part of an integrated system as per Clause 11.13 Hydro Box Unit Reference HU (Page 315) of the published Tender Dossier”.

Dr John Bonello, the Legal Representative for LBV Ltd continued by saying that he was finding it difficult to see why this unit was accepted in the first Tender but not in this one. The compressor was 100% compliant with the Technical Specifications. Besides, since this Tender had to be adjudicated by the price, there was a € 5,000 difference between the Recommended Offer and his client’s offer.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts submitted that the Appellants have mentioned no reason neither the Letter of Objection issued by LBV Ltd dated 29 May 2017 or in their first statements why the grounds for which they were disqualified were being attacked. The Negotiated Procedure was a new submission and therefore this was to be considered. The Evaluation Board had to evaluate on what they had in front of them. Dr Mizzi added that he has summoned a witness since this was a Technical Aspect.

Dr John Bonello, the Legal Representative for LBV Ltd, whilst agreeing that it was better for everyone if there was a Technical Witness to testify, added that afterwards his client would also like to testify.

At this point, Ing Stephen Ellul, a member of the Evaluation Board holding ID Card Number 464880 M was summoned by the Department of Contracts to testify under oath before the Public Contracts Review Board.

Following Mr Ellul’s testimony, Mr Justin Attard, the Director of LBV Ltd holding ID Card Number 176886 M, was summoned by Dr John Bonello to testify under oath before the Public Contracts Review Board.

At the end of Mr Attard’s testimony, Dr Matthew Paris, the Legal Representative for V & M Turnkey Ltd said that the words used in pages 297 & 298 of the Tender Document use clear words on what Bidders had to do to satisfy the Tender Document. An additional document has been submitted today, which should be accepted it would not create a Level Playing Field with all Bidders.

With regards the second point, Dr Paris submitted that it was clear that the moment that one submits an additional document, that supercedes the previous one submitted. V & M Turnkey Ltd felt that the only thing which the Public Contracts Review Board had the Authority to do at this stage was to send the case back to the Evaluation Board for further considerations.

Dr John Bonello, the Legal Representative for LBV Ltd agreed with the latter statement made by Dr Paris. When one evaluates what the two Technical Witnesses testified under oath, one sees a clear lack of appreciation by the Evaluation Board. LBV Ltd was compliant with all

the Technical Specifications since all products submitted by his clients were compliant with the Standards imposed by the European Union.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts referred to the case 599/10 of the European Court of Appeal, SAG ELV Slovensko and others decided on 29 March 2012 wherein it was decided that the Bidder was responsible for his own submission. The Evaluation Board had to decide on what they had in their hands at the moment, where it was clearly indicated that the reasons why they discarded LBV Ltd's offer were clearly justified.

At this stage, the Public Hearing was adjourned to Tuesday 1 August 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

This Board,

Having noted this Objection filed by LBV Ltd (herein after referred to as the Appellant) on 29 May 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CT 2069/2017 listed as Case No 1064 in the records of the Public Contracts Review Board, awarded by the Central Procurement and Supplies Unit (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr John Bonello

Appearing for the Contracting Authority: Dr Christopher Mizzi

Whereby, the Appellant contends that:

a) His offer was rejected for two alleged reasons namely:

- i) The Literature submitted did not include “*an inbuilt recuperator*” as per Clause 5.1.A of the Tender Document;**

- ii) With reference to the 1.28 Hydro Box Unit as per the Literature submitted, LBV Ltd is offering a unit incorporating an inbuilt compressor meaning that the unit is not part of the integrated system, as requested.**

In both cases, the Appellant is maintaining that his product complies with the requirements of the European Union regarding air conditioning, hence meeting the conditions of the Tender Dossier.

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 11 July 2017 and its verbal submissions during the Public Hearing held on 13 July 2017, in that:

- a) The Central Procurement and Supplies Unit insists that the Appellant is making claims that his product is technically compliant with the specifications as laid out in the Tender Document without**

giving proof of such compliancy. The Evaluation Board assessed the Appellant's offer on the documentation and Literature submitted by the same.

This same Board also noted the Testimonies of the witness namely

- 1. Ing Stephen Ellul summoned by the Department of Contracts;**
- 2. Mr Justin Attard summoned by LBV Ltd**

This Board, after having considered the merits of this case, arrived at the following conclusions:

- 1. From the submissions of the parties concerned and the Technical Versions and explanations of the Technical Witnesses, this Board opines that the issue at stake is of Technical Compliance of two particular items specified in the Technical Specifications of the Tender Dossier namely,**
 - a) An Air Handling Unit (AHU-1)**

b) Hydro Box Unit 1

In this respect this Board will consider both items as follows:

i) Air-Handling Unit (AHU-1)

Clause 5.1.4 in Page 298 of the Tender Document dictated that,

“The AHU shall incorporate a recuperator, consisting in a Plate Heat Exchanger, in aluminium complete with removable panel filters.”

This Board is justifiably aware that LBV Ltd submitted Technical Literature, as duly requested, which did not indicate the inclusion of an inbuilt recuperator as per Clause 5.1.4.

Through the Technical Explanation given by the Technical Witness, who is an engineer, this Board was vividly informed that the Central Procurement and Supplies Unit requested this type of specification so that the unit itself will be “*energy efficient*”.

In other words this may be termed as “*Heat Recuperator*” and during the explanations given by the same Technical witness, it

was credibly explained that not all standard units incorporate this “*Energy Efficient*” feature, so that the Central Procurement and Supplies Unit specifically requested this feature of an “*inbuilt recuperator*”.

In this regard, this Board noted that from the Literature submitted by the Appellant, no indication or mention is made to prove that the “*Recuperator*” is within the system being offered. In fact, it was factually established that such a feature was not mentioned at all, under the heading of “*Recuperation*”.

The Technical Witness, through his submission, credibly revealed that the Evaluation and assessment of the Technical compliancy of LBV Ltd’s offer was carried out by three engineers and in this particular instance, this Board is not disputing the opinion of three engineers, but rather identifying the actual Technical deficiency in the Appellant’s Offer.

During the Technical submissions it was also established that what the Appellant offered, from the Technical Literature submitted, the Evaluation Board were not in a position to confirm that the Appellant’s offer, with regards to this particular feature, was

compliant with the requirements as dictated in the Tender Document.

On the other hand, this Board noted the submissions made by Mr Justin Attard, the Director of LBV Ltd, who instead of identifying and denoting where he was compliant, stressed that due to the fact that his product was “*Eurovent Certified*”, the AHU-1 submitted by the Appellant is automatically to be considered as to include the AHU-1, as requested in the Tender Document.

In this particular regard, this Board on reviewing the contents of the document known as “*Eurovent Certified Performance*”, notes that this document dictates what type of testing requirements must be carried out to keep within the standards and to be verified as such.

However, this Board justifiably notes that this document does not prove or even indicate that LBV Ltd’s offered product complied with the requested Technical Specifications. At the same instance, when asked by this Board, the Appellant could not prove or identify the AHU-1 as included in his offer.

This Board would like to respectfully confirm that the shielded argument brought forward by the Appellant through the “Eurovent Certification” is not credible and in this regard, this Board does not uphold the Appellant’s Contentions regarding the item under review.

ii) Hydro Box Unit 1

Clause 11, (Page 315) of the Tender Document *inter alia* states that,

“The Hydro Box Unit will be used in tandem with the VRV condensing outdoor unit”.

Further on, it is also dictated that

“A Hydro Box Unit for the recovery of the heat reject from the VRV System 1 shall be supplied and installed”.

During the Technical Submissions, this Board was made aware of the importance of this feature and also was indicated with a diagram which formed part of the Tender Document and which

clearly illustrated that the compressor was not to be inbuilt in the unit, but rather connected to the “*Air Conditioning System*”.

At the same instance, this Board is comforted by the justified Technical Reasons given for the inclusion of this important feature and in this respect, this Board also opines that the requirement and its description was well explained and indicated in the Tender Document itself.

In this regard, this Board respectfully notes that whenever LBV Ltd was asked to justify and identify this requirement in his offer, the latter rested on the fact that his product was “*Eurovent*” certified, hence this Board was not being presented with proof or identification as to the compliance of features which the Central Procurement and Supplies Unit insisted that these were missing.

At the same instance, this Board justifiably emphasize that the fact that LBV Ltd’s product was “*Eurovent*” certified does not mean or imply that their product was compliant with regards to the special features as dictated in the Tender Document.

On a general note, this Board, as had on many occasions, emphasized the fact that it is the responsibility of the prospective Bidder to submit his offer to comply with all the dictated conditions laid out in the Tender Dossier.

In this regard, this Board was not presented with proof or credible explanations to justify that, with regards to the features “*Air-Handling Unit*” and “*Hydro Box Unit 1*”, the offer submitted by LBV Ltd was compliant and in this respect, this Board does not uphold the Appellant’s contentions on both these features.

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

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

1 August 2017