

PUBLIC CONTRACTS REVIEW BOARD

Case 1416 – CFT 022-0655/19 – Tender for the Supply of Liquid Water-Proofing Membrane

The tender was published on the 2nd July 2019 and the closing date of the call for tenders was the 29th July 2019. The estimated value of the tender (exclusive of VAT) was € 143,999.99

On the 8th November 2019 The Resin and Membrane Centre Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority on the grounds that their bid was disqualified as it was not the cheapest offer. A deposit of € 720 was paid.

There were three (3) bidders.

On 16th January 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – The Resin and membrane Centre Ltd

Dr Mark Attard Montalto	Legal Representative
Mr Antoine Bonello	Representative

Recommended Bidder – Vella Falzon Building Services Ltd

Dr Thomas Bugeja	Legal Representative
Mr Alexis Vella Falzon	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Eng Frankie Caruana	Chairperson Evaluation Committee
Ms Karen Scicluna	Secretary Evaluation Committee
Mr Victor Galea	Member Evaluation Committee

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Marco Woods Legal Representative of the Central Procurement and Supplies Unit requested the Board's permission to deal with a preliminary plea, in that Appellants were objecting to certain wording in the tender. As the Board has decided in several previous cases on objections of a similar

nature, remedies were available under article 262 of the Public Procurement Regulations. The Contracting Authority feels that this objection should have been tackled before the submission of tender.

Dr Mark Attard Montalto Legal Representative for The Resin and Membrane Centre Ltd referred to page 15 paragraph 4 of the technical specifications which stated that prices were to be quoted according to the respective units. The financial bid form indicated that prices had to be submitted on a 1:1:1 ratio which is what Appellants followed in their submissions but this does not conform to the tender. Consumption was different between the component parts as different quantities of each were used and this meant that the preferred bidder offer turned out to be cheaper. The prices quoted by the preferred bidder were not realistic. Appellants were prejudiced because the consumption of materials had not been taken into consideration.

The Chairman asked why this issue was brought up at this stage as the role of the Board was to ensure that the award process was carried out correctly.

Dr Woods said that the financial bid form forms part of the tender and was available from the start of the process and there was no point in challenging it now.

Engineer Frankie Caruana (487063M) called as a witness by the PCRB testified on oath that he was the Chairperson of the evaluation committee. He confirmed that the financial bid of the preferred bidder indicated no difficulty in establishing the price. Out of three bidders two were compliant whilst Appellants were not financially compliant.

Dr Thomas Bugeja Legal Representative for Vella Falzon Building Services Ltd stated that Regulation 262 provides remedy to correct errors or ambiguity in a tender. This specific tender does not specify quantities – merely unitary prices. C/A Case 45/19 was quoted in support (missing information was already missing when the tender was issued).

At this stage the Chairman proposed a short recess to enable the Board to discuss the preliminary plea raised.

On resumption of the hearing the Chairman stated that the Board had discussed the point and concluded that the appeal element raised was a matter that could have been dealt with before submission of tender – it therefore upheld the preliminary plea. He then thanked the parties for their submissions and declared the hearing closed.

End of Minutes

Decision

This Board,

having noted this objection filed by The Resin and Membrane Centre Ltd (hereinafter referred to as the Appellants) on 8 November 2019, refers to the claims made by the same Appellants with regard to the tender of reference CFT 022-0655/19 listed as case No. 1416 in the records of the Public Contracts Review Board awarded by Central Procurement and Supplies Unit (herein after referred to as the Contracting Authority).

Appearing for the Appellants: Dr Mark Attard Montalto

Appearing for the Contracting Authority: Dr Marco Woods

Whereby, the Appellants claim that:

- a) Their main contention refers to the fact that, the Financial Bid Form stipulated that the quoted rates had to be submitted on a 1:1:1 ratio. In this regard, Appellants maintain that, when taking into account the consumption indicated in the tender document, the preferred bidder's offer, although obviously cheaper but not realistic, did not include the consumption of materials.**

b) Appellants also maintain that the technical specifications of the tender stipulated that prices had to be quoted according to the respective units whilst the financial bid form denoted otherwise, hence there was a conflicting condition in the tender document.

This Board also noted the Contracting Authority's 'Letter of reply' dated 28 November 2019 and its verbal submissions during the hearing held on 16 January 2019, in that:

a) Whilst maintaining that the financial conditions in the tender document are not conflicting, the Authority, by way of a Preliminary Plea contests that such grievances should have been addressed by Appellants prior to the submission of their offer, so that their appeal, at this particular stage of the tendering process, should be dismissed.

This same Board also noted the testimony of the witness namely:

Engineer Frankie Caruana duly summoned by the Public Contracts Review Board.

This Board, prior to the commencement of the treatment of this appeal, was presented with a Preliminary Plea submitted by the Central Procurement and

Supplies Unit, contending that, Appellants were contesting certain wording and interpretation of the conditions as duly stated in the tender document. At the same instance, the Central Procurement and Supplies Unit are maintaining that, in accordance with article 262 of the Public Procurement Regulations, Appellants had the remedies to clarify such misunderstandings and/or interpretations of the tender document, under such available remedies and not at this particular stage of the tendering process.

- 1. This Board would respectfully refer to article 262 of the Public Procurement Regulations which provides for the following:**

“Prospective candidates and tenderers may, prior to the closing date of a call for competition, file a reasoned application before the Public Contracts Review Board:

(a) to set aside or ensure the setting aside of decisions including clauses contained in the procurement document and clarification notes taken unlawfully at this stage or which are proven to be impossible to perform; or

(b) to determine issues relating to the submission of an offer through the government’s e-procurement platform; or

(c) to remove discriminatory technical, economic or financial specifications which are present in the call for competition, in the contract documents, in

clarifications notes or in any other document relating to the contract award procedure; or

(d) to correct errors or to remove ambiguities of a particular term or clause included in a call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure; or

(e) to cancel the call for competition on the basis that the call for competition is in violation of any law or is likely to violate a particular law if it is continued.”

The above mentioned article provides all the remedies available to any prospective tenderer who might encounter difficulties in the interpretation or understanding of any clauses or conditions as laid out in the tender dossier.

- 2. The issues raised by Appellants, in their ‘Letter of Objection’ dated 8 November 2019, relates to concerns which can be treated under this particular article 262 and which must be made prior to the closing date for submission of offers.**
- 3. This Board notes that Appellants had submitted their offer so that, at the time of submission, same Appellants confirmed that they accepted the**

stipulated conditions of the tender document. In this regard, this Board notes that Appellants, at no particular stage of the tendering process, indicated any concern except, at the award stage.

In conclusion, this Board opines that:

- a) The issues being raised by Appellants, in their ‘Letter of Objection’ dated 8 November 2019 should have been raised, through available remedies, prior to the submission of their offer.**
- b) Appellants failed to avail themselves to seek the available remedies provided by article 262 of the Public Procurement Regulations.**
- c) The issues raised by Appellants, in their ‘Letter of Objection’ cannot be considered, by this Board at this particular stage of the tendering process.**

In view of the above, this Board,

- i. upholds the Contracting Authority’s Preliminary Plea,**

- ii. does not consider the issues raised by Appellants to merit consideration by this Board, at this particular stage of the tendering process,**
- iii. upholds the Contracting Authority's decision in the award of the tender,**
- iv. directs that the deposit paid by Appellants should not be refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

21 January 2020