

PUBLIC CONTRACTS REVIEW BOARD

Case 1494 – SPM 02-20. Tender for the Decommissioning of Existing Services and Supply, Installation and Commissioning of New Mechanical, Electrical and Extra Low Voltage Services at Floriana Elderly Home

The tender was published on the 12th March 2020 and the closing date of the tender was the 4th May 2020. The estimated value of the tender (exclusive of VAT) was € 50,135.

On the 30th July 2020 GMC Malta filed an appeal against Social Projects Management Ltd as the Contracting Authority objecting to their disqualification on the grounds that their bid was not technically compliant.

A deposit of € 400 was paid.

There were four (4) bidders.

On 28th September 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – GMC Malta

Dr Edward Camilleri	Legal Representative
Mr Gordon Camilleri	Representative

Contracting Authority – Social Projects Management Ltd

Dr Ivan Gatt	Legal Representative
Mr Simon Dimech	Member Evaluation Committee
Mr Anthony Muscat	Representative
Eng Paul Baldacchino	Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Edward Camilleri Legal Representative for GMC Malta said that the normal tender procedure was not followed as no clarifications had been sought of Appellants. If this process had been followed Appellants would have been able to complete the literature requirements – the literature submitted was

incorrect not non-complaint both in the case of the air conditioning unit and the flushing system. Since Appellants offer was € 22,000 cheaper there was more reason to seek clarification.

Dr Ivan Gatt Legal Representative for Social Projects Management Ltd said that this appeal was of a technical rather than a legal nature, as it was a case of the technical specification of the tender not being met. The performance difference between the air conditioning unit offered and the one requested was substantial as was the volume of water consumed in the flushing system. From the legal aspect there was the question of missing documents and information details not matching, whilst the price difference was of no consequence once the specifications were not met.

Mr Simon Dimech (454790M) called as a witness by the Public Contracts Review Board testified on oath that he was one of the Evaluators in the tender adjudication. He stated that the tender requested an air conditioning unit that used R32 gas which is 30% less harmful in global warming terms and 20% less costly to operate than the model offered by Appellants. The tender asked for a flushing system consuming 2.6 litres for short flush and 4 litres for a full flush. Appellants offered 3 and 6 litres respectively. In reply to a question witness stated that the gas offered by Appellants was incompatible with the system. Note 3 restricted the seeking of clarifications or rectifications.

Dr Gatt noted that the witness had clarified the reason for the disqualification very clearly, whilst Dr Camilleri said that the correct procedure had not been followed by the evaluation committee since they should have sought clarifications.

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

End of Minutes

Decision

This Board,

having noted this objection filed by GMC Malta (hereinafter referred to as the Appellants) on 30th July 2020, refers to the claims made by the same Appellants with regard to the tender of reference SPM 02/2020 listed as case No. 1494 in the records of the Public Contracts Review Board recommended for award by Social Projects Management Ltd (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants:

Dr Edward Camilleri

Appearing for the Contracting Authority: Dr Ivan Gatt

Whereby, the Appellants contend that:

- a) **Their prime concern refers to the fact that, the literature submitted was incorrect yet still compliant both for the air conditioning unit and the flushing system and since their offer was the cheapest, Appellants maintain that a clarification request from the Authority would have resolved this issue.**

This Board also noted the testimony of the witness namely:

Mr Simon Dimech – Evaluator, duly summoned by the Public Contracts Review Board.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned including the testimony of the witness, opines that the issue that merits consideration is the literature submitted by Appellants, for two items namely:

(i) Airconditioning Unit

(ii) Adult toilet

1. **This Board, as it has on so many occasions, would respectfully point out that, when the Authority requests literature, such necessary documentation is not capriciously asked for. The technical literature must not only collaborate with**

the technical offer submitted by the bidder but must also complement his declared technical specifications of the product being offered to the Authority.

- 2. The technical literature forms an integral part of the technical offer. In this particular case, the technical literature was to accompany the technical offer at submission stage, as duly denoted in article 5 c (ii) of the ‘Instructions to Tenderers’ viz:**

“(ii) Literature as per Form marked ‘Literature List’ is to be submitted with the technical offer at tendering stage. Alternatively, an Economic Operator can quote a reference number under which he/she has already supplied items so that there would be no need to submit literature. (Note 2)”

- 3. This Board notes that the literature requisite fell under note 2, which states that:**

“Tenderers will be requested to either clarify / rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within five (5) working days from notification.”

In this particular case, Appellants submitted literature for both the ‘Airconditioning Unit’ and the ‘Adult Toilet’, however, the literature so submitted did not collaborate or complement the technical specifications as duly declared by Appellants in their technical offer and as duly requested in the tender dossier.

- 4. This Board noted that, in the case of the Airconditioning Unit, the technical literature quoted a model with ‘Gas’ specification of R410a whilst the tender dossier stipulated Gas specification of R32, which is less harmful in global warming terms. In this respect, the Authority could not ask or request a clarification so that, the technical literature be amended or replaced to collaborate with what was declared in Appellants’ technical offer, as such a request would have amounted to a rectification of the technical offer.**
- 5. With regard to the technical literature of the ‘Adult Toilet’, the tender document stipulated that, the flushing system should consume 2.6 litres for short flush and 4 litres for a full flush, whilst the literature submitted denoted 3 litres for short flush and 6 litres for full flush, so that, the technical literature did not complement the technical literature as duly declared by Appellants, in their technical offer.**
- 6. It must be pointed out that, whilst it is the duty and obligation of the Evaluation Committee to abide by the principle of self-limitation, it is also the duty of the bidder to abide by the conditions and technical specifications as stipulated in the tender dossier. Such a consideration must be applied by the bidders prior to the submission of their offer and if in doubt about any condition or specification as stipulated in the tender dossier, the bidders have remedies available in this regard.**

In conclusion, this Board opines that:

- a) **The technical specifications of the literature of both the ‘Airconditioning Unit’ and the ‘Adult Toilet’ did not collaborate with the technical offer as duly declared by Appellants.**
- b) **The technical literature formed an integral part of the technical offer and any amendments thereto would amount to a rectification which is not allowable.**
- c) **The Evaluation Committee could not request a clarification in these circumstances.**
- d) **It was the duty of Appellants to ensure that their submission complies, in full, with technical specifications and conditions as duly dictated in the tender dossier.**
- e) **If in doubt, Appellants had the remedies to resolve the issues prior to the submission of their offer and such remedies were not availed of by Appellants.**

In view of the above, this Board,

- i. does not uphold Appellants’ contention,**
- ii. upholds the Contracting Authority’s decision in the recommendation for award,**
- iii. directs that the deposit paid by Appellants should not be reimbursed.**

Dr Anthony Cassar
Chairman
30th September 2020

Dr Charles Cassar
Member

Mr Richard A Matrenza
Member