

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1581 – MXR/01/2021 – Tender for the Embellishment of ‘Il-Munxar’s Village Square’ including an Environmentally Friendly Irrigation System.**

**14<sup>th</sup> June 2021**

The Board,

Having noted the letter of objection filed by Dr Joseph Camilleri on behalf of Salibastafrece Legal acting for and on behalf of Prax Concrete Ltd, (hereinafter referred to as the appellant) filed on the 5<sup>th</sup> April 2021;

Having also noted the letter of reply filed by Dr Jonathan Mintoff acting for Munxar Local Council (hereinafter referred to as the Contracting Authority) filed on the 14<sup>th</sup> April 2021;

Having also noted the letter of reply filed by Dr William Cuschieri acting for Mr Simon Grech (hereinafter referred to as the Recommended Bidder) filed on the 13<sup>th</sup> April 2021;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties;

Having heard and evaluated the testimony of the witness Mr Mario Cauchi who is an Engineer and is an Evaluator on this tender;

Having noted and evaluated the minutes of the Board sitting of the 10<sup>th</sup> June 2021 hereunder reproduced.

#### **Minutes**

#### **Case 1581–MXR/01/2021. Tender for the Embellishment of Il-Munxar’s Village Square including an Environmentally Friendly Irrigation System**

The tender was published on the 29<sup>th</sup> January 2021 and the closing date was the 2<sup>nd</sup> March 2021. The value of the tender was € 649,050.

On the 5<sup>th</sup> April 2021 Prax Concrete Ltd filed an appeal against the Munxar Local Council as the Contracting Authority objecting to their disqualification on the grounds that their offer was not technically compliant

A deposit of € 3,245 was paid.

There were two (2) bidders.

On 10th June 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

**Appellant – Prax Concrete Ltd**

Dr Joseph Camilleri	Legal Representative
Mr Mark Agius	Representative
Ms Maria Schembri	Representative

**Contracting Authority – Munxar Local Council**

Dr Jonathan Mintoff	Legal Representative
Mr William Sultana	Member Evaluation Committee
Architect Robert Grech	Member Evaluation Committee
Engineer Mario Cauchi	Member Evaluation Committee
Mr Ryan Debrincat	Representative

**Preferred Bidder – Mr Simon Grech**

Dr William Cuschieri	Legal Representative
Mr Simon Grech	Representative

Mr Kenneth Swain 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 in line with Article 89 of the Public Procurement Regulations. He then asked Appellant’s representative to make his submissions.

Dr Joseph Camilleri Legal Representative for Prax Concrete Ltd said that the appeal focuses on the fact that the Contracting Authority’s decision was not proportional and just. A notice for clarification was complied with but this failed to raise the shortcomings with the luminaire material which turned out to be the reason that the offer was refused. All that was asked in the clarification note was the literature and warranty on the luminaire which was complied with but rejected although the only query on that seems to be the polymer material offered. Reference was made to these three Court Cases in support of Appellant’s claim:

- Case 211/2002 where it was held that in case of minimality the Contracting Authority should not reject tender outright but use of clarifications if the evaluation committee had alternatives
- Case 440/2012 ‘the right to refuse is not outright’
- Case 281/2015 ‘if there is no direct effect on the outcome’.

Dr Jonathan Mintoff Legal Representative for Munxar Local Council said that one of the grievances raised by Appellant was that it was not informed of the reason for rejection yet it was obvious from what transpired today that this was not the case. The Authority sent a clarification note regarding the item in dispute and since there was no literature on the luminaire they could not know at that stage if it conformed or not. The rejection was not on a minimalist point as the use of polymer is a crucial point. Reference made to the Court cases is not valid as they all precede 2016 when Public

Procurement Regulations SL 601.03 came into force. The bidder is expected to be familiar with the requirements of a tender and to comply accordingly.

Dr Camilleri stated that the minimal point should not be taken in isolation but considered in the total context of the tender. In proportional terms the difference is minimal as it did not alter the final result.

Engineer Mario Cauchi (24187G) called as a witness by the Contracting Authority testified on oath and explained the difference between polymer material and die cast metal – the former product was requested as it is resistant to UV rays and corrosion. Both materials have their pros and cons but the tender specified polymer.

Dr Mintoff concluded by saying that if Appellant had any doubts he could have made use of a call for remedy although the specifications were clear on what was required. The audited report presented confirms that the notification was sent indicating the reasons for disqualifications and the award should be confirmed.

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

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 10<sup>th</sup> June 2021.

Having noted the objection filed by Prax Concrete Ltd (hereinafter referred to as the Appellant) on 5<sup>th</sup> April 2021, refers to the claims made by the same Appellant with regards to the tender of reference MXR/01/2021 listed as case No. 1581 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Joseph Camilleri
Appearing for the Contracting Authority:	Dr Jonathan Mintoff
Appearing for the Recommended Bidder:	Dr William Cuschieri

Whereby, the Appellant contends that:

- a) **Request for Clarification** - When the Appellant received a request for clarifications, it did comply by the stipulated timeframes. In the clarifications, Munxar Local Council was specific in the various clarifications pertaining to Point D (Luminaires & Lamps), whereby for Luminaires Type H, I and K, the Evaluation Committee highlighted in details which specifications required additional / amended documentation.

- b) **Notification issues** - On 26<sup>th</sup> March, the Appellant received notification that the tender was awarded to Simon Grech, however no notification was received as to why Prax Concrete Ltd was deemed as unsuccessful. Only when checking the status of the tender, it was made aware that a recommendation notification was issued on the etenders portal.
- c) **Unfair competition and market distortion** - Prax Concrete Ltd encountered difficulties in obtaining the necessary specification for Luminaires. It resulted that only one supplier in Malta could provide the specification mentioned in the tender. Initially the supplier did not want to furnish Prax Concrete Ltd with details as he stated to being committed exclusively to another bidder. Prax Concrete Ltd contends this goes against fair competition and is creating a market distortion. When confronted the supplier eventually furnished the necessary documentation.
- d) **Easter recess** - The DoC issued a notice stating that no awards, recommendations or cancellations can take place between 22<sup>nd</sup> March and 4<sup>th</sup> April both dates included. The Contracting Authority did not abide by this notice, sending the recommendation on the 26<sup>th</sup> March.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 14<sup>th</sup> April 2021 and its verbal submission during the virtual hearing held on 10<sup>th</sup> June 2021, in that:

- a) **Request for Clarification** - Clause 5 states "*Requests for Clarifications and/or Rectifications concerning a previous request dealing with the same shortcoming shall not be entertained*". Hence the exercise of the discretion to "save" a tender seemingly non-compliant is not unrestricted. Moreover, in line with CJEU's interpretations, although a contracting authority is allowed to request clarification, this remains a discretionary power and not duty on the Contracting Authority. (Case C-599/10). In "Intermarkets Stationery Limited v. Direttur tal-Kuntratti", the Court of Appeal decided the onus to provide correct documentation rests solely on the bidder and not on the Contracting Authority.
- b) **Technically not compliant** - The Luminaire Type D proposed by the Objector is made of Die Cast Aluminium – cast iron and steel iron. While the Tender Document stipulated "... UV stabilized polymeric materials in black or dark grey colour.... and shall include a 10 year warranty....". Court of Appeal in "SR Environmental Solutions Limited v. Dipartiment tal-Kuntratti" in its decision reaffirmed the point that a Contracting Authority is bound by the conditions outlined in the tender documentation.
- c) **Alleged notification issues** - The Contracting Authority sought an automated 'Auditing Report' through the EPPS which outlines all of the communications sent to the bidders, (including via email). Item #50 confirms that the Appellant did indeed receive the notification.
- d) **Alleged unfair competition and market distortion** - none of the other bidders for this call for tender encountered the difficulty which appellant laments to have encountered. No other complaint was filed by any of the other bidders. Furthermore, other bidders did provide the

requested documentation in full conformity of the tender specifications. Nevertheless, a bidder may seek products and the relative documentation from the EU market beyond domestic market / suppliers. Moreover, for such an objection, the objector had the opportunity and remedy to either seek clarifications or submit a call for remedy as per regulation 262 of the PPR. The Contracting Authority vehemently denies the allegation by the Objector. Multiple verification processes were carried out.

- e) **Easter Recess** – this hasn't caused any prejudice to the objector as it filed the objection within the stipulated time period.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witness duly summoned, will consider Appellant's grievances, as follows:

- a) **Request for Clarification / Technically not compliant** – The Board makes reference to the below points:
- a. The proviso to Clause 5 states *“Requests for Clarifications and/or Rectifications concerning a previous request dealing with the same shortcoming shall not be entertained”*
  - b. A request for Clarification was sent by the Contracting Authority to the Appellant on 9<sup>th</sup> March 2021. The detail within is not deemed vague due to the insufficient literature provided to the evaluation committee in the initial stages of the bidding process.
  - c. As per Court of Appeal *“Intermarkets Stationery Limited vs Direttur tal-Kuntratti”*, the Court opines that the onus to provide the correct documentation rests solely on the bidder and not on the Contracting Authority.
  - d. The Appellant submitted a material for Luminaire Type D that was not in accordance with the Tender Specifications in that the Appellant's offer was for a material of *‘Die Cast Aluminium – cast iron and steel iron’* while the Tender Document requested *‘polymeric material’*

When considering all the above, the Board opines that the Contracting Authority correctly made a request for clarification on this specific luminaire with the information it had in hand which is not deemed vague. Thereafter it followed the proviso of Clause 5. The Board does not uphold Appellant's grievance.

- b) **Notification issues** - The Board makes reference to the 'audit report' sought through the EPPS which outlines all of the communications sent to the bidders. It transpires that on 26<sup>th</sup> March 2021 an email was sent with the subject being *“..... Announce Disqualification Results”*. The Board does not uphold Appellant's grievance.

- c) **Unfair competition and market distortion** – The Board notes that there were 4 prospective bidders in this tender. Apart from the Recommended Bidder there was another prospective bidder who offered a technically compliant Luminaire Type D. Hence, *prima facie*, there does not seem to be any unfair competition and / or market distortion. Moreover, such a grievance should have been submitted in accordance with Regulation 262 of the Public Procurement Regulations. The Board does not uphold Appellant’s grievance.
- d) **Easter recess** – The Board notes that the ‘Notice of Award’ was issued in a period in which a recess was *in vigore* as per the notice issued by the IT Unit within the Department of Contracts. However no prejudice was caused to the objector. The Board upholds Appellant’s grievance.

**In conclusion this Board opines that;**

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant’s Letter of Objection and contentions,
- b) Upholds the Contracting Authority’s decision in the recommendation for the award of the tender,.
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
**Chairman**

**Dr Charles Cassar**  
**Member**

**Mr Carmel Esposito**  
**Member**