

PUBLIC CONTRACTS REVIEW BOARD

Case 1624 – SPM 04/21 – Tender for the Removal of Existing Aluminium, Steel and Timber Apertures and other items at the existing building situated at Triq Vajrita c/w Triq Nigel Dennis, Marsascala

20th September 2021

The Board,

Having noted the letter of objection filed by Dr Chris Cilia on behalf of Cilia & Associates Advocates acting for and on behalf of Mr Franklee Agius, (hereinafter referred to as the appellant) filed on the 11th June 2021;

Having also noted the letter of reply filed by Dr Ivan Gatt on behalf of GTG Advocates acting for Social Projects Management Ltd (hereinafter referred to as the Contracting Authority) filed on the 21st June 2021;

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

Having noted and evaluated the minutes of the Board sitting of the 9th September 2021 hereunder-reproduced;

Minutes

Case 1624 – SPM 04-21. Tender for the Removal of Existing Aluminium, Steel and Timber Apertures and other Items at the Existing Building situated at Triq Vajrita C/W Triq Nigel Dennis, Marsascala

The tender was published on the 11th February 2021 and the closing date was the 15th March 2021. The value of the tender excluding VAT was € 29,690.

On the 11th June 2021 Mr Franklee Agius filed an appeal against Social Projects Management Ltd (S.P.M.) as the Contracting Authority objecting to their disqualification on the grounds that their bid was not considered financially compliant.

A deposit of € 400 was paid.

There were eleven (11) bidders.

On 9th September 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Mr Franklee Agius

Dr Chris Cilia	Legal Representative
Mr Jeffrey Farrugia	Representative

Contracting Authority – Social Projects Management Ltd

Dr Ivan Gatt	Legal Representative
Mr Patrick Vella	Representative
Mr Joseph Cini	Representative

Preferred Bidder – Solergia

Mr Dione Zahra	Representative
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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.

Dr Chris Cilia Legal Representative for Mr Franklee Agius said that the Appellant’s offer was rejected as it was considered to be abnormally low. The basis of the tender was that the contract could be carried out at the price tendered. There is a difference in the way different types of tenders are treated. In this instance the tender calls for dismantling and carting away – there is no long term contract but a specific one-off requirement. Appellant’s offer is to remove materials and hence he is complying with the tender with the difference that he is planning in re-using the materials rather than disposing of it. This makes his offer not only cheaper but environmentally friendly and should be commended rather than disqualified. The bid is not abnormally low as at the price offered the bidder will be able to fulfil the contract.

Dr Ivan Gatt Legal Representative for Social Projects Management Ltd stated that the Contracting Authority required two elements – one that the bidder will cart away the waste and two an assurance that it will be environmentally dumped. These requirements bound all bidders and were not optional – allowing the re-use of materials was not an option as otherwise there would not be a level playing field. Bidders cannot vary or ignore the tender terms since this could lead to an offer being abnormally low.

Dr Cilia concluded by saying that Appellant dealt totally with the tender requirements but through a different process.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 9th September 2021.

Having noted the objection filed by Mr Franklee Agius (hereinafter referred to as the Appellant) on 11th June 2021, refers to the claims made by the same Appellant with regards to the tender of reference SPM 04-21 listed as case No. 1624 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Chris Cilia

Appearing for the Contracting Authority: Dr Ivan Gatt

Whereby, the Appellant contends that:

- a) The decision (whereby bid was not considered financially compliant) was based on the fact that the financial offer which was submitted was abnormally low when compared to the estimated procurement value, constituting 18.5% of the published procurement estimated value.
- b) Attention is drawn that to the fact that the operational strategies suggested by the Appellant in order to maximise the potential for cost efficient operations are not such as to constitute a material breach of the tender specifications, inclusive of those indicated in Bill No. 2 of the Bill of Quantities.
- c) The Appellant's indication that financial projections are based on his ability to 're-use' 'various items' is not in itself in breach of the obligation to 'cart away to an approved dumping site' and to 'load, cart away and dump in an authorised dumping site' the specific items and materials indicated in Bill No.2 of the Bill of Quantities. Indeed, the clarification and justification offered during the tendering process does not constitute a material and manifest violation of the said conditions indicated in Bill No 2 of the Bill of Quantities.
- d) Furthermore, Bill No. 2 of the Bill of Quantities merely indicates that the successful bidder will be under an obligation to load, cart away and dump specific materials at an approved dumping site, but does not impose such an obligation with respect to all materials subject of the tender, nor does it preclude the tenderer from entering into any commercial agreement with third parties following the execution of the bidder's obligations under the contract.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 21st June 2021 and its verbal submission during the virtual hearing held on 9th September 2021, in that:

- a) Reference is made to Bill of Quantities Bill No. 2 & Bill No. 3 – Preambles D
 - i. One can note that it has been clearly described that the items whereby the removal works have to be carried out, these have to be carted away to an approved / authorised dumping site. In view of this, the Evaluation Committee could not accept the reason stated by the Appellant which is as follows *“the offer is considerably low when compared to the estimate / materials listed are going to be reused”* when he was asked to justify why his financial offer is abnormally low when compared to the published estimate.

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

- a) The Board notes that the Contracting Authority correctly followed the Public Procurement Regulations, more specifically regulation 243(1) when it required the economic operator to explain the price proposed in the tender which appeared to be abnormally low, at 18.5% of the published procurement estimated value.
- b) The proposed bidder, now Appellant, did reply within the stipulated timeframes where he stated *“the offer is considerably low when compared to the estimate / materials listed are going to be reused”*
- c) This Board opines that the Tender Dossier was very clear in the Bill of Quantities Bill No. 2 & Bill No. 3 - Preamble D whereby *“Cleaning of site of all rubbish and other waste material (both internally and externally), load, cart away and **dump in an authorised dumping site**. Any fees or taxes for the dumping of materials shall be borne by the successful bidder.”* (bold and underline emphasis added)
- d) Hence this tender, in this section, required the i) cleaning ii) loading, iii) carting away and iv) dumping in an authorised dumping site.
- e) This fourth 'task' was not optional. It was an objective that the Contracting Authority wanted to 'reach'.
- f) The Evaluation Committee would have gone against the concept of proportionality had it approved the response provided by the Appellant for its request as per regulation 243(1). It would have led to a non-even playing field between the proposed bidders which goes against the very principles of the Public Procurement Regulations.

This Board does not uphold the grievances of the Appellant.

The Board,

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

Mr Lawrence Ancilleri
Member

Mr Richard Matrenza
Member