

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1626 – 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**

**20<sup>th</sup> September 2021**

The Board,

Having noted the letter of objection filed by Dr Timothy A. Bartolo on behalf of Cilia & Associates Advocates acting for and on behalf of CrediEnergy Ltd, (hereinafter referred to as the appellant) filed on the 11<sup>th</sup> 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 21<sup>st</sup> 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 16<sup>th</sup> September 2021 hereunder-reproduced;

#### **Minutes**

### **Case 1626 – 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 11<sup>th</sup> February 2021 and the closing date was the 15<sup>th</sup> March 2021. The value of the tender excluding VAT was € 29,690.

On the 11<sup>th</sup> June 2021 CrediEnergy Ltd 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 16<sup>th</sup> September 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

**Appellant – CrediEnergy Ltd**

Dr Timothy Bartolo

Legal Representative

**Contracting Authority – Social Projects Management Ltd**

Dr Ivan Gatt

Legal Representative

Mr Patrick Vella

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 invited submissions.

Dr Timothy Bartolo Legal Representative for CrediEnergy Ltd said that the merits and arguments in this case were similar to the cases on the same tender heard earlier. Appellant’s bid was not abnormally low as it still met the terms of the tender. There was nothing to preclude the bidder from dumping the material as specified and then using his commercial acumen to buy it back from the dumping site. It is therefore feasible that Appellant could meet the contract terms at the price offered whilst benefitting the environment.

Dr Ivan Gatt Legal Representative for Social Projects Management Ltd said all the previous arguments put forward in the other cases on this tender applied here. The scope of the tender is not in contest and the argument is not if the material should be discarded or re-used but if the tender conditions have been met – there is no justification to accept alternatives since the bidder must follow all the elements of the tender otherwise the other bidders are prejudiced.

The Chairman thanked the parties for their submissions 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 16<sup>th</sup> September 2021.

Having noted the objection filed by CrediEnergy Ltd (hereinafter referred to as the Appellant) on 11<sup>th</sup> June 2021, refers to the claims made by the same Appellant with regards to the tender of reference SPM04-21 listed as case No. 1626 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Timothy A. Bartolo

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 48.8% of the published procurement estimated value.
- b) Attention is drawn 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' 'a significant amount of the items/materials' 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 21<sup>st</sup> June 2021 and its verbal submission during the virtual hearing held on 16<sup>th</sup> 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 48.8% of the published procurement estimated value.
- b) The proposed bidder, now Appellant, did reply within the stipulated timeframes whereby his indication that financial projections are based on his ability to 're-use' 'a significant amount of the items/materials'.
- 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

**Dr Vincent Micallef**  
Member