

PUBLIC CONTRACTS REVIEW BOARD

Case 1631 – CT 2511/2020 – Works Tender for M&E and Finishing Works using Environmentally Friendly Products at St. Nicholas College, Dingli Primary School, Triq il-Kbira, Triq il-Buskett, Dingli

29th September 2021

The Board,

Having noted the letter of objection filed by Dr Luciano Busutil acting for and on behalf of Patti Construction Ltd, (hereinafter referred to as the appellant) filed on the 17th June 2021;

Having also noted the letter of reply filed by Mr Franco Costa acting for and on behalf of Foundation for Tomorrow's Schools (hereinafter referred to as the Contracting Authority) filed on the 25th June 2021;

Having heard and evaluated the testimony of the witness Mr Giuseppe Capone (Bookkeeper at Patti Construction Ltd) as summoned by Dr Luciano Busutil acting for Patti Construction Ltd;

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 noted and evaluated the minutes of the Board sitting of the 28th September 2021 hereunder-reproduced.

Minutes

Case 1631 – CT 2511/2020. Works Tender for M&E and Finishing Works using Environmentally Friendly Products at St Nicholas College, Dingli Primary School, Triq il-Kbira, Triq il-Biskett, Dingli

The tender was published on the 18th December 2020 and the closing date was the 16th February 2021. The value of the tender excluding VAT was € 253,123.

On the 17th June 2021 Patti Construction Ltd filed an appeal against the Foundation for Tomorrow's Schools as the Contracting Authority objecting to their disqualification on the grounds that their bid was considered technically non-compliant.

A deposit of € 1,265 was paid.

There were three (3) bidders.

On 28th September 2021 the Public Contracts Review 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 – Patti Construction Ltd

Dr Luciano Busuttil

Legal Representative

Contracting Authority – Foundation for Tomorrow’s Schools

Mr Franco Costa

Chairperson Evaluation Committee

Ms Amanda Cassar

Secretary Evaluation Committee

Mr Melchisedech Zarb

Member Evaluation Committee

Preferred Bidder – Completo JV

Mr Chris Refalo

Representative

Mr Mark Zammit

Representative

Mr Steve Gambin

Representative

Ms Jeanelle Cauchi

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 Luciano Busuttil Legal Representative for Patti Construction Ltd requested leave to produce a witness.

Mr Giuseppe Capone (0154727A) called as a witness by the Appellant testified on oath that he is a bookkeeper at Patti Constructions Ltd and was responsible for uploading the tender electronically. He stated that he was aware that after submission of the tender he had submitted two further documents in the same file, but could not recall what documents they were although probably it was the literature list.

Questioned by Mr Franco Costa Representative for the Contracting Authority witness confirmed that he had sent the same literature list reproduced in the tender dossier twice.

Dr Busuttil said he relied on the Board to check if the literature requested in the tender was submitted.

Mr Costa confirmed that the documents requested in the tender, namely the technical literature, had not been submitted.

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 28th September 2021.

Having noted the objection filed by Patti Construction Ltd (hereinafter referred to as the Appellant) on 17th June 2021, refers to the claims made by the same Appellant with regards to the tender of reference CT 2511/2020 listed as case No. 1631 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Luciano Busuttil

Appearing for the Contracting Authority: Mr Franco Costa

Whereby, the Appellant, in the Letter of Objection, contends that:

- a) The Appellant does not agree and accept the decision in the Letter of Rejection issued on 8th June 2021, where it was stated *“02- Recti- Patti Construction Ltd was issued where the EO was asked to clarify the workplan and rectify the literature. The EO failed to submit any rectification replies pertaining to the literature. Hence the bid was deemed to be technically non-compliant.”*
- b) The sole reason for the offer being rejected, was simply because the evaluation and adjudicating board, found that the offer presented was incomplete, and had missing documents which were required. On receiving notice that these documents were required, the appellant immediately presented electronically the required documents, namely the Technical Literature File. The file was uploaded in PDF format, as requested. However, both documents presented were uploaded in a single PDF file. Most probably the adjudicating and evaluating boards did not realise this and thought that one of the documents was missing, hence not accepting the offer. This is being said, since the decision given related to the fact that the document, that is to say the Technical Literature was missing, when in fact it was not. The Technical Literature File was uploaded in the system within the time-frames imposed by the Contracting Authority.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 25th June 2021 and its verbal submission during the virtual hearing held on 28th September 2021, in that:

- a) It is being reaffirmed that the missing documents required by the Evaluation Committee were in fact not submitted by the Appellant. As part of the tendering process and during the publication period, bidders are requested to submit literature, which may take the form of data sheets and manufacturer's technical specification, in accordance with a list compiled by the Contracting Authority. This list, entitled Literature List is published along with the various tender documents, and features several items which bidders are obliged to present in the form of documents. In this case, instead of submitting the literature of the requested items, the bidder erroneously submitted the document 'Literature List' as initially drafted by the Contracting Authority. During adjudication, the Evaluation Committee issued a rectification letter to the bidder, giving him the opportunity to rectify his position by submitting the missing documentation. The rectification letter was issued in terms of Note to Clause 5 (Note 2) – Tenderers will be requested to either clarify / rectify an incorrect and / or incomplete documentation, and/or submit any missing documents within five (5) working days from notification. The bidder, once again, submitted the form 'Literature List' which did not contain any information.
- b) The literature is required by the Evaluation Committee to corroborate the technical offer submitted by the bidder as part of the technical review phase. This is the modus operandi adopted by Evaluation Committees to attest the technical compliance of bids.

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) The Board notes the testimony under oath of Mr Giuseppe Capone whereby, upon being queried, during the technical evaluation stage, by the Evaluation Committee to rectify his submission and to submit the 'correct' Technical Literature documents, in the form of data sheets and manufacturer's technical specification, he confirmed that he had sent the same literature list reproduced in his original bid. (Note: the original submission of the Appellant as 'Technical Literature' was to re-produce the document 'Literature List' as initially drafted by the Contracting Authority)

Due to the non-submission, by the Appellant company, of the requested Technical Literature supporting their prospective bid, this Board does not uphold the Appellant's grievances.

In conclusion this 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

Dr Vincent Micallef
Member

Mr Lawrence Ancilleri
Member