

PUBLIC CONTRACTS REVIEW BOARD

Case 1634 – MGOZ/MPU T 9/2021 - Works - Tender for the Restoration of the External Facades of the Gozo Campus of the University of Malta, Xewkija Gozo including the use of Environmentally Friendly Paint Materials

6th October 2021

The Board,

Having noted the letter of objection filed by Dr Reuben Farrugia on behalf of Farrugia Advocates acting for and on behalf of Camray Co Ltd, (hereinafter referred to as the appellant) filed on the 28th June 2021;

Having also noted the letter of reply filed by Dr Francelle Saliba and Ms Joyce Farrugia acting for the Ministry for Gozo – Ministerial Procurement Unit (hereinafter referred to as the Contracting Authority) filed on the 8th July 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 5th October 2021 hereunder-reproduced.

Minutes

Case 1634–MGOZ/MPU T 9/2021. Tender for the Restoration of the External Facades of the Gozo Campus of the University of Malta, Xewkija, Gozo including the use of Environmentally Friendly Paint Materials

The tender was published on the 6th February 2021 and the closing date was the 8th March 2021. The value of the tender excluding VAT was € 192,664.

On the 28th June 2021 Camray Company Ltd filed an appeal against the Ministry for Gozo as the Contracting Authority objecting to their disqualification on the grounds that their bid was administratively non-compliant

A deposit of € 963 was paid.

There were two (2) bidders.

On 5th October 2021 the Public Contracts Review 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 – Camray Co Ltd

Dr Reuben Farrugia
Ms Lara Lewis

Legal Representative
Representative

Contracting Authority – Ministry for Gozo

Dr Francelle Saliba
Ms Christabelle M Farrugia
Mr Joseph Xiberras
Mr Saviour Tabone
Mr Lawrence Muscat
Mr Jorge Tony Spiteri
Mr Marnol Sultana

Legal Representative
Chairperson Evaluation Committee
Member Evaluation Committee
Member Evaluation Committee
Member Evaluation Committee
Member Evaluation Committee
Representative

Preferred Bidder – Zappettini Restoration Ltd

Dr John L Gauci

Legal 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 Reuben Farrugia Legal Representative for Camray Co Ltd said that the appeal is based on two sections in the tender on which Appellant has been disqualified. A point raised in the letter of reply from the Authority concerning a 'wrong' ESPD form was not part of the original disqualification reasons; in any case Appellant should not be disqualified if the system downloaded the wrong form.

With regard to the claim in point 3B.1 where Appellant failed to tick one of the two boxes the Authority should have sought a clarification as they are obliged to do. It is a fallacy to claim that only one clarification could be sought since Section 5 does not impede any number of qualifications until the evaluation is completed.

Dr Francelle Saliba Legal Representative for the Ministry for Gozo said that the ESPD submitted through the EPPS did not tally with the official form which is the only recognised version. The option 'not applicable' claimed by the Appellant does not exist on that form. In Section 3B.1 Appellant accepts that it failed to fill one of the boxes and the argument that the ESPD was a very lengthy document, and hence likely to lead to mistakes, is not a sustainable one. It is an established practice that on the same subject only one clarification is sought.

Dr Farrugia pointed out that the ESPD was reproduced as downloaded by the system, whilst on the point of clarifications, limiting the number might be the practice but it is not the law. Section 5 certainly puts no limit on the number of clarifications.

Dr Saliba replied that Appellant's claim had not been submitted on the official form and on its own admission the tax form had only been partially filled in.

Dr John Gauci Legal Representative for Zappettini Restoration Ltd said that the shortcomings on which Appellant had been disqualified were not minor points. Tender was clear in Section 5 that further clarifications could not be entertained. The Authority was bound by what was submitted otherwise there would not be a level playing field.

Dr Farrugia claimed that the clarification being sought was on a freshly submitted document not on an existing one and therefore was allowed-in any case the current practice was not the law, to which Dr Saliba pointed out that the tender itself limited the number of clarifications.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 5th October 2021.

Having noted the objection filed by Camray Co Ltd (hereinafter referred to as the Appellant) on 28th June 2021, refers to the claims made by the same Appellant with regards to the tender of reference MGOZ/MPU T 9 /2021 as case No. 1634 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Reuben Farrugia
Appearing for the Contracting Authority:	Dr Francelle Saliba
Appearing for the Preferred Bidder:	Dr John L. Gauci

Whereby, the Appellant contends that:

- a) In the letter of the 21st June 2021 the Contracting Authority submits that the Appellant was administratively non-complaint in view of the fact that, according to the Contracting Authority, the sub-contractors (Aluserv Limited) ESPD submitted had two sections which were not filled in, namely Section 3B.1 and 3D.4.
- b) **Section 3D.4**- In relation to Section 3D.4 it must be stated that the optional replies indicated were three namely “Yes”, “No” and “Not Applicable”. Whilst the “Yes” and “No” replied had a box inserted which needed to be ticked / marked according to the relative reply, on the other hand the reply “Not applicable” had no box which needed to be ticked.

In actual fact the reply by Aluserv Limited (the subcontractor) to Section 3D.4 was “Not applicable” and therefore no box had to be ticked or marked. Had a box been provided next to the term “Not applicable”, Aluserv Limited would have certainly ticked/marked the applicable box, but as stated no box was inserted next to the term “Not Applicable” and therefore no box was to be ticked. Notwithstanding that, Aluserv Limited gave an appropriate reply to Section 3D.4 as explained above, the Contracting Authority concluded that Section 3D.4 was not filled in.

- c) **Section 3B.1** - In relation to Section 3B.1 it must be stated that contrary to what the Contracting Authority submits, this Section 3B.1 was actually filled in relative to the security contribution column. For clarification it is to be submitted that section 3B.1 had two columns namely one entitled “taxes” and the other one entitled “social security contributions”. Whilst compiling the voluminous ESPD (a 34-page document) the sub-contractor (Aluserv Limited) erroneously completed only one column of section 3B.1. With all due respect this is evidently a *lapsus calami* (oversight) by Aluserv Limited, which oversight is well justified when considering the number of questions asked in the ESPD and the nature of the question asked. As is clearly evident from the contents of clause 5 (B) of section 1 of the Tender Documents, the submissions to be made in terms therefore, including the ESPD, are subject to the terms of “Note 2” of Clause 5 of section 1 of the Tender Documents. It is more than evident that in terms of “Note 2” the Contracting Authority has an obligation to request a clarification or rectification in relation to incorrect or incomplete ESPD. Since “Note 2” states that “tenderers will be requested” this imposes an obligation on the Contracting Authority to request a clarification or rectification and it is not discretionary. After all such an obligation is in conformity with the jurisprudence on the matter, both local and on European level.
- d) On a final note, it is to be stated that the relevant paragraph in the Contracting Authority’s letter dated 21st June 2021. *“Kindly note that your offer was considered as Administratively Non - complaint since in reply to the rectification request, section 3B.1 and section 3D.4 of the ESPD were not filed”*. The said paragraph implies that a rectification was requested to the ESPD at issue and notwithstanding not all replies were completed, but this is not the case. From the above it is evident that the Contracting Authority never requested a clarification/rectification in relation to the subcontractors (Aluserv) ESPD as it was obliged to do in terms of “Note 2”.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 8th July 2021 and its verbal submission during the virtual hearing held on 5th October 2021, in that:

- a) It is to be stated that during the first evaluation meeting, the evaluation Committee noted that Camray Company Ltd originally listed Megaline Ltd as a sub-contractor (with 26% share ME)

on the EPPS system, specifically under Cycle 1: Eligibility/Selection Section, Selection Criteria C: Technical and Professional Ability: Subcontracting Proportion.

- b) The evaluation committee noted that Camray Company Ltd did not supply a separate ESPD for the subcontractor as per section 1 – Instruction to Candidates Clause 5B - Technical and Professional Ability; subcontracting portion of the tender document. To this regard, the Evaluation Committee sent a clarification request to Camray Company Ltd to rectify the missing documents and information, with the Evaluation Committee taking in consideration that this section falls under Note 2 of Clause 5. This Clarification was sent through the Epps on the 22nd March 2021. Camray Company Ltd submitted a reply to this clarification within the stipulated time frame (5 working days) on the 22.03.2021. The evaluation board noted that the details submitted (at rectification stage) were for a different sub-contractor than was originally indicated (Megaline Ltd) in the original submission. Specifically, the rectified sub-contractors ESPD were this time round for Aluserv Ltd which Camray submitted trades related to new apertures. Proportion of works approx. 18%. The Evaluation committee took in consideration that the sub-contractor may have changed and decided to accept the change in the sub-contractor and went ahead to evaluate the details provided for Aluserv Ltd. However, the Evaluation Committee noted that as indicated in the Evaluation Report, Sections 3B.1 and section 3D.4 of the ESPD were not completely filled in and had missing information. The bidder clearly had to tick Yes or No box in both sections.
- c) **Section 3D.4**- For Section 3D.4, as is clearly shown in the ESPD template document which was part of the tender document and that was available to the bidders on Epps. The Subcontractor clearly had only two options which were: Yes or No. There was no option for “Not Applicable”, as is being stated by the appellant, in their objection. In the version of ESPD referenced to in the second page of the objectors reply there are the words Not applicable, where the bidder is arguing that there was no box that could be ticked for the ‘Not applicable’ option. The ESPD version attached to objectors reply is not the official version which was published in terms of Tender MGOZ/MPU T 9/2021 and as such is not recognized by the Contracting Authority, who on its part, dissociates itself, from such version.
- d) **Section 3B.1** - With regards to Section 3B.1 the subcontractor was clearly asked to tick ‘Yes’ or ‘No’ with regards to the question about taxes. This was left empty, as also confirmed by the bidder, in its letter of objection.
- e) Since as clearly noted in Notes to Clause 5 of the tender document (pg.6), that Requests for Clarifications and/or Rectifications concerning a previous request dealing with the same shortcoming shall not be entertained, the Evaluation Committee could not send out another clarification on the same shortcoming. Furthermore, as per Article 5B concluding statement of the tender document (pg.5), *‘it is the Economic Operators responsibility to ensure that the correct information is reflected in the ESPD response format for the above criteria’*.

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) With regards to the first reason for administrative non-compliance and hence first grievance of the Appellant company, relating to **Section 3D.4**, this Board takes note of the Reasoned Letter of Reply of the Contracting Authority whereby included within it is a “True Copy of the Original” of pages 0 – 28. More specifically, page 17 makes reference to question 3D.4 and this Board notes that the only possible ‘Answer’ was either a “Yes” or a “No”. There is no mention of the option “Not Applicable” within it. Hence, considering that this “Not Applicable” option does not exist in the original form, this Board does not uphold the Appellant’s grievance.
- b) In reference to the second reason for administrative non-compliance and hence second grievance of the Appellant company, relating to **Section 3B.1**, this Board notes that since the first grievance has not been upheld, at this stage it is deemed immaterial whether the Appellant was entitled to a second round of clarifications. This Board however opines that the Tender Dossier is unequivocal when it states in
 - i. page 5, Section 1 – Instructions to Tenderers – paragraph 5 (d) that *“It is the Economic Operator’s responsibility to ensure that the correct information is reflected in the ESPD tender response format for the above criteria.”*
 - ii. page 6, Section 1 – Instructions to Tenderers – Notes to Clause 5 that *“Requests for Clarifications and/or Rectifications concerning a previous request dealing with the same shortcoming shall not be entertained.”*

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