

PUBLIC CONTRACTS REVIEW BOARD

Case 1644 – MF010/2020 – Tender for Haulage Services for Furniture and Bulky Items for the Ministry for Finance and Financial Services and its Line Depts

1st November 2021

The Board,

Having noted the letter of objection filed by Dr Joseph M Sammut on behalf of SMM Group acting for and on behalf of Mr Frans Borg, (hereinafter referred to as the appellant) filed on the 23rd July 2021;

Having also noted the letter of reply filed by Ms Vanessa Mangion and Dr Ivan Sammut acting for the Ministry for Finance and Employment (hereinafter referred to as the Contracting Authority) filed on the 30th 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 26th October 2021 hereunder-reproduced;

Minutes

Case 1644–MF010/2020. Tender for Haulage Services for Furniture and Bulky Items for the Ministry for Finance and Financial Services and its Line Departments

The tender was published on the 12th November 2020 and the closing date was the 3rd December 2020. The value of the tender excluding VAT was € 120,000.

On the 23rd July 2021 Mr Frans Borg filed an appeal against the Ministry for Finance and Employment (formerly Ministry for Finance and Financial Services) as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed not to be the technically compliant.

A deposit of € 600 was paid.

There were four (4) bidders.

On 26th October 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Mr Frans Borg

Dr Joseph M Sammut

Legal Representative

Mr Frans Borg

Representative

Contracting Authority – Ministry for Finance and Employment

Dr Ivan Sammut

Legal Representative

Ms Vanessa Mangion

Representative

Mr Geoffrey Scicluna

Representative

Ms Stephanie Grech Mallia

Representative

Mr Mario Bugeja

Representative

Preferred Bidder – Borg Movers

Mr Nicholas Borg

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 Joseph Sammut Legal Representative for Mr Frans Borg said that there was no justification for this disqualification as the information regarding the vehicles which were deemed not to have been supplied was not correct since log books and insurance certificates had been supplied in every case and this was tantamount to providing the technical declaration. This was a question of proper evaluation of the documents submitted.

Dr Ivan Sammut Legal Representative of the Ministry for Finance and Employment said that the Appellant had failed to submit the self-declaration form which came under Note 3 and therefore could not be rectified and thus the offer was not valid. Court of Appeal decisions had always confirmed that missing documents eliminate a bid.

Dr Joseph Sammut said that the log books are a form of declaration to which Dr Ivan Sammut replied that log books had not been submitted for the pallet loader and the fork lifter, so even if one were to accept that the log books are a form of self declaration the offer could still not be considered.

Dr Joseph Sammut stated that this was over formalisation something that the Courts had ruled should be avoided.

Dr Ivan Sammut mentioned that there was a host of Court of Appeal cases confirming that missing documents meant disqualification.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 26th October 2021.

Having noted the objection filed by Mr Frans Borg (hereinafter referred to as the Appellant) on 23rd July 2021, refers to the claims made by the same Appellant with regards to the tender of reference MF010/2020 as case No. 1644 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Joseph M Sammut

Appearing for the Contracting Authority: Dr Ivan Sammut

Whereby, the Appellant contends that:

- a) As can be ascertained, in this call for tendering the Appellant was the cheapest bidder at €57,810 excluding VAT whilst the tender was awarded to another bidder holding Tender ID 145052 for the global amount of €81,300 excluding VAT. When the Appellant inquired the reason as to why his offer was rejected when his was the cheapest, he was informed that it happened so since he was asked for further clarifications and he failed to put forward same. The Appellant objects to this allegation since from no where does it transpire that he was ever contacted, neither verbally nor through the EPPS system, which should and is the medium through which such a request should have been made.
- b) In the light of this state of events, the Appellant contends that:
 - i. He has followed all established tender criteria and has submitted all the information and details required.
 - ii. At no point in time was the Appellant asked to clarify any part or any aspect of the tender document.
 - iii. That once it resulted that the offer submitted by the Appellant was the cheapest and everything was in order, the tender should have been awarded to him. Once all documentation was in order and the offer was the cheapest, than the award should have automatically gone to the Appellant.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 30th July 2021 and its verbal submission during the virtual hearing held on 26th October 2021, in that:

- a) Amongst the technical specifications required in clause 4.2 of the tender document, it was specifically required that "Tenderer must confirm (in the form of a self-declaration that he will provide the following vehicles as required: i) Truck ii) Pallet loader iii) Fork Lifter iv) Ladder Lift Truck
- b) Objector failed to submit this technical declaration that all vehicles being requested are going to be provided. This is a Note 3 requirement meaning that "No rectification shall be allowed"
- c) Since Objector failed to submit the technical Note 3 self-declaration, Objector's bid was considered as technically not compliant and his bid was not financially evaluated in accordance with tendering regulations.
- d) Article 146 of the Public Procurement Regulations (S.L. 601.03) inter alia states that: "*tenders may be clarified, specified and optimised at the request of the contracting authority. However, such clarification, specification, optimisation or additional information may not involve changes to the essential aspects of the tender or of the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document, where variations to those aspects, needs and requirements are likely to distort competition or have a discriminatory effect*"
- e) It is evident on the basis of law, case-law and the tender document, Objector's bid was technically non compliant as he failed to submit the required self-declaration.

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

The main points to consider are the following:

1. **Cheapest bid** - This Board deems irrelevant arguments brought forward by the Appellant whereby they state that their bid was the cheapest. This Board opines that the compliance criteria need to be dealt with separately and in a specific order. i.e. first the administrative compliance needs to be ascertained. If a bid does not pass the administrative compliance test, the evaluation is to be halted there and then. It is irrelevant whether it is technically compliant or not. The same with the second compliance test, i.e. technical compliance. If a bid is not found to be technically compliant, there is no financial evaluation to be held. Hence any arguments regarding the financial aspect of the bid are deemed irrelevant to proceedings.
2. **Self-declaration** – The Board opines that there is no contestation that the Tender Dossier requested a 'Self-declaration' and that it falls under 'Note 3' procedures. What is being contested is what constitutes a 'Self-declaration'. Appellant argued that log-books and insurance certificates were duly provided. This Board opines that log-books and insurance certificates do not constitute

a 'self-declaration'. Such a 'self-declaration' is to have a different format, e.g. taking the format of a confirmation letter signed by the prospective bidder. Arguments that this requirement was ambiguous and or not necessary should have been dealt with under Regulation 262 of the Public Procurement Regulations.

Hence, this Board does not uphold Appellant's grievances.

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

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member