

PUBLIC CONTRACTS REVIEW BOARD

Case 1645 – ALC 02/2021 – Tender for the Finishing Works at the New Local Offices at H’Attard

1st November 2021

The Board,

Having noted the letter of objection filed by Dr Marlon Borg on behalf of DF Advocates acting for and on behalf of FES Projects Ltd, (hereinafter referred to as the appellant) filed on the 6th August 2021;

Having also noted the letter of reply filed by Dr Matthew Bondin acting for the Attard Local Council (hereinafter referred to as the Contracting Authority) filed on the 13th August 2021;

Having heard and evaluated the testimony of the witness Mr Christopher Falzon (Member of the Evaluation Committee) as summoned by Dr Matthew Bondin acting for the Attard Local Council.

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 28th October 2021 hereunder-reproduced;

Minutes

Case 1645–ALC 02/2021. Tender for the Finishing Works at the new Local Council Offices at H’Attard

The tender was published on the 16th March 2021 and the closing date was the 23rd April 2020. The value of the tender excluding VAT was € 365,000.

On the 6th August 2021 FES Projects Ltd filed an appeal against the Attard Local Council 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 € 1,825 was paid.

There were five (5) bidders.

On 28th 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 – FES Projects Ltd

Dr Marlon Borg
Ms Laura Harron

Legal Representative
Representative

Contracting Authority – Attard Local Council

Dr Matthew Bondin
Mr Stefan Cordina
Mr Christopher Falzon

Legal Representative
Representative
Representative

Preferred Bidder – GP Finishings Ltd

Dr Norval Desira
Mr Paul Spiteri
Mr Adam Mizzi

Legal Representative
Representative
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 Marlon Borg Legal Representative for FES Projects Ltd stated that there are three principles underlying this appeal – fairness, price and a reasonable decision. The tender criterion was price and the Appellant’s offer was the cheapest, but was disqualified due to the lack of the key expert form. The replacement of the architect should not have been the cause for rejection as the skills of architects are the same, so the criterion was satisfied in this respect. Rectification was in any case allowed under Note 2.

The reply by the Local Council was not in line with the decision of the evaluation committee who did not include late submission as a reason for exclusion – the second clarification requested was replied to in time and should not have been used as an excuse.

Dr Matthew Bondin Legal Representative for Attard Local Council requested a representative of the Local Council to testify.

Mr Christopher Falzon (37983M) called as a witness by the Contracting Authority testified on oath that he was a member of the Evaluation Committee and said that the committee noted shortcomings in the submissions straight away and requested the first clarification on 24 June 2021. The second shortcoming was that different details on the architect were submitted.

When asked by Dr Borg if he was aware that the key expert form had been rectified witness replied that he was not aware that the architect had been replaced.

Dr Bondin said that the principal criterion was the price and the Authority had been lenient in their attitude regarding the lateness of replies. Apart from the price, the last minute change of architect had to follow the other aspects of the tender.

Dr Borg stated that it was clear that the second clarification was replied to in time and it appeared as if every attempt had been made to deny the contract to the cheapest bidder. Confirmation was issued that the key expert form had been received.

Dr Bondin said that the Council had acted fairly and equitably by doing its utmost to consider all submissions.

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 28th October 2021.

Having noted the objection filed by FES Projects Ltd (hereinafter referred to as the Appellant) on 6th August 2021, refers to the claims made by the same Appellant with regards to the tender of reference ALC 2/2021 as case No. 1645 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Marlon Borg

Appearing for the Contracting Authority: Dr Matthew Bondin

Whereby, the Appellant contends that:

- a) That the Attard Local Council (the "Contracting Authority") while acknowledging that the offer submitted by FES Projects Ltd ("FES") was in fact *"the lowest priced"* it was nevertheless rejected on the basis that FES *"failed to submit the requested Architect's warrant of Stefan Vancell as per original Key Experts Form 1st submission but instead submitted CV and warrant of David Muscat with new Key Experts form"*. Thus according to the Contracting Authority, as a consequence of such occurrence, FES *"did not satisfy all three award criteria"*. That such basis for disqualification of FES from the consideration of the award itself by the Contracting Authority, is wrongful, irregular, abusive and illegal.
- b) Both the Eligibility Criteria as well as the Exclusion and Selection Criteria fall under Note 2 of the tender document issued by the Contracting Authority, which holds that: *"Tenderers will be requested to either clarify / rectify any incorrect and / or incomplete documentation, and / or submit any missing documents within five (5) working days from notification."* That on the basis of that premised above, FES had every right to submit a rectification and / or clarification when requested by the Contracting Authority to do so. That the rectification and / or clarification submitted by FES to the Contracting Authority was submitted within the prescribed time limit and completely in line with the requirements of the tender process in question.

- c) That furthermore, FES insists that no change has been made to the tender offer and the bid was not prejudiced in any manner. The requirements imposed by the tender are to ensure that the candidate has the technical and professional abilities to perform the contract awarded. There is no shred of doubt, neither is any doubt being raised, that the Architect whose CV and Key Experts Form was submitted has such qualifications.
- d) That the rationale behind the Contracting Authority's decision to disqualify FES' bid for the reason therein stated is manifestly unreasonable. The Contracting Authority's reasonableness in taking decisions relating to tenders is to be measured in line with the spirit of the public procurement regulations, the aim of which is to ensure efficiency in the use of public money by ensuring that the best offer gets chosen. This line of reasoning is also harmonious with EU Directives, obliging all contracting authorities to base awards of public contracts on the most economically advantageous offer. It is also worth adding that the tender was to be awarded to the cheapest bidder!

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 13th August 2021 and its verbal submission during the virtual hearing held on 28th October 2021, in that:

- a) The respondent contends that the appellant (like the other bidders) was during the process asked for a rectification vis-à-vis the technical specifications. At a later stage a clarification was asked for with regards to the submission of: "Architect's warrant and Health and Safety officer inclusion in the OHSA 'Competent Persons Register'. Please also note we are cordially still awaiting technical specifications of elevator as per previous rectification."
- b) The respondent makes it clear that the appellant did not produce the technical specifications within the 5 days as prescribed and these were only presented together with the documents submitted vis-à-vis the architect's warrant and the Health and Safety Officer proof of inclusion in the OHSA Register. Thus, it is clear that not only did the appellant fail to produce the technical specifications in a timely manner, but when these were submitted together with the documents relating to the architect's and H & S officer credentials, the appellant produced the CV and warrant of a different architect from the one indicated originally in the bid.
- c) The respondent agrees that it could ask for clarifications/rectifications during the tender stage, which it in fact did (on two occasions), but it also insists that these clarifications/rectifications could not persist ad infinitum especially due to the urgency of the works. Following the initial rectification and the subsequent clarification asked by the respondent, it had then resolved to end the tender process and evaluate the bids as submitted. It is thus evident that the evaluation committee found that the appellant failed to produce the documents requested and thus it had no

other option but to award the tender to the next cheapest bid accompanied by all the correct documentation and thus satisfying all the requested criteria.

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 makes reference to the testimony under oath of Mr Christopher Falzon where he stated that:
 - i. First clarification request was sent to the Appellant on 24th June 2021. However, in the acts provided, more specifically the Evaluation Report, signed by all the members within it, it is stated that 'Meeting 1' of the Evaluation Committee was held on 1st July 2021 at 11.30 hrs to 12.30 hrs.
 - ii. *"he was not aware that the architect had been replaced"*. This in reference to the key expert form of Architect David Muscat. It is to be noted that when the Appellant did in fact submit the Warrant & CV of a different Architect David Muscat, instead of Architect Stefan Vancell, they also filed an updated Key Expert Form. This all in accordance with Note 2 of the Tender Dossier. Hence such a change in architect is in fact deemed admissible and allowable.
- b) This Board deems irrelevant arguments brought forward by the Appellant whereby they state that their bid was the cheapest. Reference is also made to the Rejection Letter of 30th July 2021 issued by the Contracting Authority whereby *"Even though your offer was the lowest priced...."*. 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 proposed bid are deemed irrelevant to proceedings.

When considering the above, this Board upholds Appellant's grievances.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) To uphold the Appellant's concerns and grievances;
- b) To cancel the 'Notice of Award' letter dated 30th July 2021;
- c) To cancel the Letters of Rejection dated 30th July 2021 ;
- d) To order the contracting authority to re-evaluate the bids received in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee and taking into consideration the findings of this Board.
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member