

PUBLIC CONTRACTS REVIEW BOARD

Case 1651 – SPD3/2021/015 – Tender for the Manufacturing, Installation, Maintenance and Storage of Christmas Decorative Lighting

15th November 2021

The Board,

Having noted the letter of objection filed by Dr Jean Paul Grech on behalf of Dr Jean Paul Grech & Associates acting for and on behalf of Caruana Tech Trading Ltd, (hereinafter referred to as the appellant) filed on the 30th August 2021;

Having also noted the letter of reply filed by Dr Francelle Saliba and Mr John Xuereb acting for the Ministry for Gozo – Cultural Heritage Directorate (hereinafter referred to as the Contracting Authority) filed on the 9th September 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 11th November 2021 hereunder-reproduced;

Minutes

Case 1651–SPD3/2021/015. Tender for the Manufacturing, Installation, Maintenance and Storage of Christmas Decorative Lighting

The tender was published on the 28th May 2021 and the closing date was the 18th June 2021. The value of the tender excluding VAT was €38,350

On the 30th August 2021 Caruana Tech Trading Ltd filed an appeal against the Ministry for Gozo (Cultural Heritage Directorate) as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be technically non-compliant and on the cancellation of the tender.

A deposit of € 400 was paid.

There was one (1) bidder.

On 11th November 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Caruana Tech Trading Ltd

Dr Jean Paul Grech
Mr Jason Caruana

Legal Representative
Representative

Contracting Authority – Ministry for Gozo (Cultural Heritage Directorate)

Dr Francelle Saliba
Mr Marnol Sultana
Mr John Xuereb

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 Jean Paul Grech Legal Representative for Caruana Tech Trading Ltd stated that the appeal turned on an unsigned specification sheet questionnaire included in the tender. Since his client was the only bidder, once his bid was disqualified the tender had to be cancelled. The Contracting Authority assumed that this lack of signature was a failure on the part of the bidder to accept the terms of the tender which however is contradicted by the fact that the technical specification form was signed. This technical form cross references all the questions in the unsigned questionnaire. Normally tenders request either one or the other of these forms and several past tenders bear this out. The Appellant is not challenging the Authority in the way the tender is formulated and since they were the only bidders no other party is being prejudiced.

Dr Francelle Saliba Legal Representative for the Ministry for Gozo said that there was no point to this appeal. According to Public Procurement Regulation 16 the Authority is entitled to request what it requires in a tender. There is no argument that the questions were repeated in the two forms but it still obliged the bidder to sign both to meet the tender requirements. The fact that Appellant was the only bidder has no bearing on the decision.

Dr Grech re-iterated that Appellant was not challenging the terms of the tender but simply that there was a legitimate expectation that submitting one form was sufficient as it was a mere duplication of another form.

Dr Saliba concluded by saying that the PPRs make it clear that it is up to the Authority to frame the terms of the tender and was clear that both forms had to be signed whether they duplicated each other or not. The decision of the Authority should stand.

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 11th November 2021.

Having noted the objection filed by Caruana Tech Trading Ltd (hereinafter referred to as the Appellant) on 30th August 2021, refers to the claims made by the same Appellant with regards to the tender of reference SPD3/2021/015 as case No. 1651 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Jean Paul Grech

Appearing for the Contracting Authority: Dr Francelle Saliba

Whereby, the Appellant contends that:

- a) Although at face value, it is true that the tender specifications sheet questionnaire was neither filled in nor signed, it is to be noted that the questionnaire is simply a repetition of the details and the technical specifications found in section 3 of the Tender Dossier. In fact all items indicated in the questionnaire not only feature in the same section 3 but the wording of the questionnaire is taken word for word from the said technical specifications in section 3. The company duly endorsed the Technical Offer declaration form and by doing so the company was effectively accepting all technical specifications and terms of reference of Section 3 of the tender dossier. Bearing in mind that the questionnaire is reproducing the contents of section 3, the directorate was wrong in considering that the company had not endorsed the contents of the questionnaire and that consequently the company was not intent in honouring said obligations/technical specifications. It is to be noted that items (1) and (2) of the questionnaire feature in the technical requirements section (Page 13 of the Tender Document) whereas the other items all feature in clause 4.2 on pages 12 and 13.
- b) Secondly it is to be noted that tender documents would normally have either the technical offer declaration form or else the tender specifications sheet and not both. This is in itself a confirmation that both are referring to one and the same thing. The company has participated in various tender procedures and the tender documents have always included either the declaration form or the questionnaire but not both. Hence when the company representative signed the declaration form, he considered that it was not necessary to endorse the questionnaire even the more so when he realised that the contents of the same questionnaire were all reproduced in section 3 of the tender dossier and he had already signified his consent to all those conditions by endorsing the technical offer declaration form.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 9th September 2021 and its verbal submission during the virtual hearing held on 11th November 2021, in that:

- a) Technically non-compliant - The offer was rejected on the grounds that it was technically non-compliant since the Tender Specifications Sheet Questionnaire was neither filled in nor signed. "Since this falls under Note 3, it was not possible to request a clarification. Being the sole bidder, the evaluation committee had no option but to recommend the cancellation of the tendering process in line to article 18.3 (a) of the General Rules Governing Tendering. The fact that the bidder was the sole tenderer has no value on whether a technically non-compliant offer is accepted or not.
- b) Claims related to Repetition - The objector takes it in his hands to decide that the questionnaire is a repetition of the technical specifications and produces a table wherein he compares questionnaire to, according to him equivalent clauses and paragraphs under Section 3, of the Terms of Reference. It is pertinent to note that decisions on how procurement documents are prepared and published remain solely within the remit of the Contracting Authority. In fact it's the duty of the Contracting Authority to prepare procurement documents at law, it's not the duty of the tenderer. The Questionnaire which the tenderer, now objector, failed to fill in and sign, qualifies as a supporting document to the terms of reference.
- c) Tender documents: Technical Declaration &/ Technical Questionnaire - Again, the objector takes it upon himself to decide that this tender had to contain either a technical offer declaration form or else the tender specifications questionnaire sheet and not both and produces another table featuring a list of tenders which contained, either one or the other document and not both. Respectfully, it is pertinent to note that each tender is a separate and distinct document and there is nothing that hinders the Contracting Authority from requesting both documents that is Technical Declaration and or Technical Questionnaire. It is up to the Contracting Authority to prepare the procurement documents at law (Article 16(1) (c) S.L. 601.03). It was not up to the tenderer, now the objector, to decide that once he signed the declaration form, then it was not necessary to endorse the questionnaire. The tender document was clear in its requirements, moreover the bidder also had the opportunity to lodge clarifications at tendering stage, if any requirement, was not clear. Indeed, the tenderer in failing, to fill in and sign the questionnaire, failed also to give his consent to this important supporting document.

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:
 - i. That the 'Tender Specification Sheet Questionnaire' was not filled in nor signed. This also on an *ex admissis* basis on the part of the Appellant.
 - ii. That this specific document falls under Note 3 whereby "*No rectification shall be allowed. Only clarifications on the submitted information may be requested.*"
- b) The Board opines that the argument brought forward by Appellant whereby normally a tender document, would either have within them the technical offer declaration or else the tender specifications sheet and not both is irrelevant. Any such argument or deemed ambiguity, if any, would need to be dealt with under Regulation 262 of the Public Procurement Regulations and not under Regulation 270 of the PPR.

Therefore, 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 cancellation of the tender procedure,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Dr Vincent Micallef
Member