

PUBLIC CONTRACTS REVIEW BOARD

Case 1654 – SPD1/2021/093 – Tender for the Supply, Delivery, and Installation of Various Furniture, produced with Environmentally Friendly Materials and Processes for Block ‘O’, University Residence Office

19th November 2021

The Board,

Having noted the letter of objection filed by Dr Kris Borg on behalf of Kris Borg & Associates acting for and on behalf of FX Borg Furniture Limited, (hereinafter referred to as the appellant) filed on the 28th October 2021;

Having also noted the letter of reply filed by Dr Carlos Bugeja on behalf of Prolegal Advocates acting for the University of Malta (hereinafter referred to as the Contracting Authority) filed on the 8th November 2021;

Having also noted the letter of reply filed by Mr Steve Portera acting for Aretrop Ltd (hereinafter referred to as the Preferred Bidder) filed on the 10th November 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 16th November 2021 hereunder-reproduced;

Minutes

Case 1654–SPD1/2021/093. Tender for the Supply, Delivery and Installation, of Various Furniture, produced with Environmentally Friendly Materials and Processes, for Block O, University Residence Office Block (UM2346)

The tender was published on the 18th June 2021 and the closing date was the 19th July 2021. The value of the tender excluding VAT was € 370,703.

On the 28th October 2021 F X Borg Furniture Ltd filed an appeal against the University of Malta as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be technically not compliant.

A deposit of € 1,853.52 was paid.

There were seven (7) bidders.

On 16th November 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar 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 – F X Borg Furniture Ltd

Dr Kris Borg	Legal Representative
Mr Joseph Borg	Representative
Ms Jenny Cassar	Representative

Contracting Authority – University of Malta

Dr Jurgen Micallef	Legal Representative
Ms Elaine Mangion	Secretary Evaluation Committee
Mr Chris Schinas	Representative

Preferred Bidder – Aretrop Ltd

Mr Steve Porteras	Representative
Mr Santo Porteras	Representative
Mr Enis Fesci	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 Kris Borg Legal Representative for F X Borg Furniture Ltd said that his client's bid was favourable and compliant and the only reason for rejection was a missing document. The tender request was for a general plan to ensure environmental control in line with Article 20 of the dossier which asked for a general rather than a specific plan. The problem arises however since Article 20 is not mentioned in the tender and does not exist; hence the rejection is based on something that does not exist.

Appellant did submit that his Company is ISO 14001 certified 'to manufacture and supply' and this included dust and noise mitigation and thus the bidder is fully compliant on environmental controls. In any case the tender refers to pure assembly of furniture which does not create dust nor traffic problems. The Authority claims that the Appellant failed to provide the required documents when in fact all necessary documentation was submitted. If in doubt clarification, which in this case was allowed, should have been sought. The Authority is wrong in assuming that the ISO certificate does not cover dust and environmental issues. The fact that Appellant did not attend the clarification meeting, as the Authority claims, has no bearing on the tender submissions.

Dr Jurgen Micallef Legal Representative for the University of Malta said that it was unfortunate that through an oversight reference was made in the tender to Article 20, but that applied to all bidders and hence it did not prejudice the Appellant, who did not request any clarification on this point. It was clear that due to Note 3 restrictions the lack of documents could not be rectified. Similarity to PCR Case 1646 was quoted in that there the request by Appellant was also not met. It is up to the Contracting Authority what they request and not up to the bidders what they provide.

Dr Borg stated that the Authority was requesting acceptance of their oversight but they were not prepared to consider bidder's point of view. Appellant made it very clear that they followed all regulatory requirements.

Dr Micallef said that he has no further points to make but was relying on the written submissions already made.

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 16th November 2021.

Having noted the objection filed by FX Borg Furniture Limited (hereinafter referred to as the Appellant) on 28th October 2021, refers to the claims made by the same Appellant with regards to the tender of reference SPD1/2021/093 listed as case No. 1654 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Kris Borg

Appearing for the Contracting Authority: Dr Jurgen Micallef

Whereby, the Appellant contends that:

- a) The Environmental Management Plan is part of the Technical Offer Form and in Item d) speaks of *“A general plan outlining how the Bidder shall ensure environmental controls (dust, noise, traffic, waste etc. as per Environmental Regulations and the Health and Safety Plan in line with Article 20 of the Special Conditions.”* The above requirement must be in line with Article 20 of the Special Conditions. However, if one looks at the general conditions, one finds that Article 20 does not even exist! To this effect the requirement is in essence null, void and unintelligible and thus the rejection of the appellant’s tender on the basis submitted by the Evaluation Committee is equally null, void and unintelligible.
- b) It is not true or fair to state that the Appellant had no environmental controls in place, and had not submitted the same to the Evaluating Committee. The Appellant submitted the ISO 14001 achieved by the company. This confirms that FX Borg Furniture Limited has been certified as adhering to all environmental regulations established by the EU, including but not limited to dust and traffic obligations.

- c) The Environmental Statement uploaded through the ePPS clearly states that ‘.....
.F.X.Borg Furniture Ltd not only safeguards the environment, but also conforms to applicable environmental regulatory requirements. Therefore, this document stipulates that, the Company takes into consideration all environmental aspects in this tender submittal.’ This, in itself encompasses any environmental obligations, including dust, noise, traffic, waste etc. The fact that dust and traffic are not included in Clause 2 of this document does not in any way imply that these obligations will not be met since this obligation was already satisfied through the ISO 14001 certification. It is to be kept in mind that the Environmental Management Plan required “A general plan” and not a specific plan.
- d) It is to be pointed out that dust mitigation and traffic mitigation are totally irrelevant and unconnected with the tender in question. The joinery works required for this tender pose no dust pollution and are limited only to assembly of certain furniture on site, performed with hand tools, as are most carpentry works nowadays. As regards the traffic mitigation issue, this will only be limited to one or two truck loads of furniture at a time on campus and a furniture lifter if and when required. With the project site being within the University campus, this will have no impact whatsoever on road traffic at all. It is reminded that the roads within University Campus are not even public roads - hence one cannot speak of traffic, and it is not even the case that any truck carrying furniture will be on any roads within the University - there being so many parking and open spaces.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 8th November 2021 and its verbal submission during the virtual hearing held on 16th November 2021, in that:

- a) Following the evaluation stage (Evaluation report dated 28th September 2021), it resulted that the Objector satisfied the Eligibility Criteria, but not the Technical Criteria. The offer by the Objector was considered as Technically Non-Compliant by the Evaluation Committee particularly because the Objector had failed to submit what are its 'dust mitigation' and 'traffic mitigation' controls under the 'Environmental Management Plan', which items were strictly required under the Technical Offer Form; which form falls under Note 3. The University respectfully stresses that with respect to the Technical Offers, each and every economic operator had been informed that:

“Kindly note that all technical criteria listed in the Technical Offer Form are of a mandatory nature and thus failure to complete even single item will disqualify the submitted offer”

Considering this, the University respectfully submits that its decisions are solely based on what has been submitted by the bidders and according to the relevant regulations governing the tender document itself. The controls required to mitigate traffic and dust were required by all economic operators, and not on a selective basis. Thus, all economic operators knew that they had to submit such information. Other economic operators have managed to submit such information; however, the Objector failed to do so.

- b) **An item falling under note 3** - The University stresses that the issue at hand relates to an item falling under Note 3 of the Tender Document. Therefore, the University was strictly prohibited from rectifying an issue falling under Note 3 and the Evaluation Committee had to automatically disqualify the Objector (and, for that matter, any other Economic Operator failing to submit the required documentation under Note 3) for failing to submit documentation under Note 3, for whatever reason.
- c) **Article 20 of the Special Conditions** - With respect to the shortcomings of the Tender Document relating to Article 20 of the Special Conditions, the University humbly submits that as with any other tender process, the economic operators are provided ample time to enquire regarding any clarifications which they may wish to obtain. The University also submits that the other economic operators were privy to the same shortcomings in the Tender Document itself. All economic operators were presented with the same Tender Document. Thus, all economic operators were privy to the issue relating to Article 20 of the Special Conditions. This, therefore, means that the economic operators could have requested further clarification from the University prior to the closure of the tender, as permitted by Article 87(a) of Subsidiary Legislation 607.03. Hence, the Objector's complaint relating to article 20 could have been easily solved had the Objector made preliminary enquiries. Whilst the Objector had enquired regarding other issues, the Objector failed to specifically address this issue. Furthermore, the Objector was presented with the opportunity to attend a clarification meeting/site visit on Monday, 1 st July 2021 at 10:00 hours at the Estates, Facilities and Capital Developments Office at the University of Malta. However, the Objector failed to attend such meeting.
- d) **Submitting Other Documentation** - The Objector submits that it had submitted other documentation in lieu of the specific documentation required relating to “dust mitigation” and “traffic mitigation”. However, the University respectfully submits that by no means could the University (and any other Contracting Authority) assume that the documentation submitted satisfies the criteria in question. In assuming, the University would have violated the well-established principle in public procurement referred to as the concept of "Self-Limitation". On this, the University kindly directs this Honourable Board to review the recent decision given in Case 1591 of 2021 (20th September, 2021), where it was decided the respective Contracting Authority could not have made any assumptions in coming to a decision. Finally, the Objector

also states that that the "dust mitigation and traffic mitigation are totally irrelevant and unconnected with the tender in question". On this, the University respectfully submits that it is up to the Contracting Authority to decide what is required and what is not required, and certainly not up to the Economic Operators.

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 opines that the Rejection Letter sent to the Appellant on 18th October 2021 is ambiguous in its terms when it states: "*A General Plan outlining how the bidder shall ensure environmental controls (dust, noise, traffic, waste etc as per Environmental Regulations and the Health and Safety Plan in line with **Article 20** of the Special Conditions*". (bold & underline emphasis added). The Board notes that within the tender dossier Section 2 – Special Conditions, there is no article 20. Hence, it is somehow oblivious how a prospective bidder can be deemed non-compliant due to an article which is not part of the tender dossier. If the Contracting Authority was aware of such ambiguity in the tender dossier it was within its remit to issue a clarification notice to all prospective tenders advising of such ambiguity.
- b) Due to the circumstances identified in point (a) above specific to this case, this Board deems the ISO 14001 certification presented by the Appellant company during the tendering stage as appropriate since after all the Contracting Authority was after 'a general plan' and not anything specific. The Quality Manual presented in relation to ISO 14001 does include references to 'minimum nuisance' in relation to dust, traffic and noise)

Therefore, this Board upholds the grievances of the Appellant.

However, this Board does not accept the argument that dust mitigation and traffic management are totally irrelevant and unconnected with this tender in question as brought forward by the Appellant. The requirements of the tender document are the remit of the Contracting Authority and any prospective bidders who feel aggrieved by a form of ambiguity are well within their right to apply with a Call For Remedy under regulation 262 of the PPR.

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 18th October 2021;
- c) To cancel the Letter of Rejection dated 18th October 2021 sent to F.X. Borg Furniture Ltd;
- d) To order the contracting authority to re-evaluate the bid received from F.X. Borg Furniture Ltd in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee, whilst also taking into consideration this Board's findings;
- 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

Dr Vincent Micallef
Member