

PUBLIC CONTRACTS REVIEW BOARD

Case 1671 – SPD3/2021/045 – Tender for the Supply, Delivery, Installation, Testing and Commissioning of Mechanical and Electrical Services in an Environmentally Friendly Manner at MGOZ office at GB Olivier Street, Victoria, Gozo

17th January 2022

The Board,

Having noted the letter of objection filed by Mr Silvio Buttigieg for and on behalf of XT Malta Ltd, (hereinafter referred to as the appellant) filed on the 19th November 2021;

Having also noted the letter of reply filed by Dr Francelle Saliba and Ms Carmen Ogilvie Galea acting for the Ministry for Gozo (hereinafter referred to as the Contracting Authority) filed on the 29th November 2021;

Having heard and evaluated the testimony of the witnesses Mr Ruben Cassar (Chairman of the Evaluation Committee) as summoned by Dr Francelle Saliba acting for the Ministry for Gozo;

Having heard and evaluated the testimony of the witnesses Ing Jeffrey Muscat (Member of the Evaluation Committee) as summoned by Dr Francelle Saliba acting for the Ministry for Gozo;

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 January 2022 hereunder-reproduced;

Minutes

Case 1671 – SPD3/2021/045 – Tender for the Supply, Delivery, Installation, Testing and Commissioning of Mechanical and Electrical Services in an Environmentally Friendly Manner at MGOZ offices at G.B. Olivier Street, Victoria Gozo

The tender was issued on the 28th June 2021 and the closing date was the 19th July 2021. The value of the tender, excluding VAT, was € 131,865.40.

On the 19th November 2021 XT Malta Ltd filed an appeal against the Ministry for Gozo as the Contracting Authority objecting to their disqualification on the grounds that their bid was considered to be technically non-compliant.

A deposit of € 660 was paid.

There were six (6) bidders.

On the 11th January 2022 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 – XT Malta Ltd

Mr Silvio Buttigieg Representative

Contracting Authority – Ministry for Gozo

Dr Francelle Saliba	Legal Representative
Mr Ruben Cassar	Chairperson Evaluation Committee
Ms Alison Haber	Secretary Evaluation Committee
Mr Christopher Attard	Member Evaluation Committee
Mr Jason Sultana	Member Evaluation Committee
Mr Carmen Ogilvie-Galea	Representative

Preferred Bidder – Mr Richard Paul Cauchi

Mr Richard Paul Cauchi 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.

Mr Buttigieg Representative of XT Malta Ltd said that the appeal was based on the claim that there was technical literature missing. However the questions raised by the Contracting Authority do not seem to be pertinent.

Dr Francelle Saliba Legal Representative for the Ministry for Gozo stated that the offer was discarded as it did not meet all tender requirements and therefore failed to fulfill the Public Procurements Regulations. Even just one missing technical requirement was enough to disqualify a bid. She then requested witnesses to support the claim of the Authority.

Mr Ruben Cassar (517970M) called as a witness by the Authority testified on oath that he was the Chairperson of the Evaluation Committee. He listed a number of shortcomings on the offer by Appellant which caused the rejection of the bid.

Engineer Jeffrey Muscat (512594M) called as a witness by the Authority indicated in detail the points raised by the Appellant in his letter of objection and the unsatisfactory submissions thereon. Appellant expected the evaluators to search for attributes which he failed to include on certain products offered. As an example witness quoted the Emergency Lighting where

Appellant failed to include the input power and daylight colour and then stated that the evaluators should have known these facts. The literature supplied stated a lamp rating of 1.5 watts but bidder offered 5.5W – in fact there was an issue on the literature of all components and which did not meet the tender specifications. Bidder’s confirmation at a later stage was not sufficient.

In reply to a question from Dr Saliba witness confirmed that the literature on several items offered was not compliant and that items requested were freely available on the local market.

Mr Silvio Buttigieg said that the literature requested had been accepted in past tenders and if the procedure was recently changed he should have been notified. The literature he submitted was as provided by the manufacturers and he could not alter it to suit the Contracting Authority – contrarywise the Authority should ensure that they request products which conform with manufacturer’s literature. The literature is not a technical document and certain things had to be taken for granted as, for example, the earthing bar in the cabinet. He noted that no reply was given as to why his offer on VRF equipment was wrong.

Dr Francelle Saliba stated that on the latter point made by Appellant the answer was that he failed to provide what was required. The objector failed to satisfy the literature requirements and certain technical points.

The Chairman thanked the parties for the submissions and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 11th January 2022.

Having noted the objection filed by XT Malta Ltd (hereinafter referred to as the Appellant) on 19th November 2021, refers to the claims made by the same Appellant with regards to the tender of reference SPD3/2021/045 listed as case No. 1671 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Mr Silvio Buttigieg

Appearing for the Contracting Authority: Dr Francelle Saliba

Whereby, the Appellant contends that:

- a) During the rectification period and the letter sent to confirm and to submit any new literature to have the items quoted to be in line with the tender specification requested, we had submitted some literature, and wrote confirmation of some other items which they requested only to confirm. We did this by a written signed document to confirm the original literature submitted. We had seen that this tender has not been awarded to us on minor issues and not technicality, that if it was the case, it can change the full scope of the tender specifications. Also there was a tender specification that is only done for two brands available in Malta and exclude all other equipment (all other brands are all with the same specs) that it is in line with EU legislations. Some items requested by the evaluation boards are so common that these will not be listed on a literature by the manufacturer.
- b) While we had explained in detail all the points which were not accepted by the evaluation committee during the process of awards, the Appellant can't understand why such a tender can be rejected on such points that it will not affect or change the scope of the project itself.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 29th November 2021 and its verbal submission during the virtual hearing held on 11th January 2022, in that:

- a) The tenderer, now objector did not prove that the respectively submitted bid satisfies the following two elements:
 - i. is in compliance with the standards and technical requisites of the tender dossier; and
 - ii. that it meets the performance or functional requirements of the contracting authority.
- b) In fact, in the first page of the objection, plaintiff erroneously concludes that:

“this tender has not been awarded to us on minor issues and not technicality” and in the next sentence admits that it did not satisfy at least one technical requirement because allegedly “there was a tender specification that is only done for two brands available in Malta”
- c) On the third page type of VRF units the objector reiterates: *“VRF System: Please note that one of the outdoor units was requested to have a minimum cooling capacity of 22.7 Kw. Please note that this type of VRF units with this range of 22.7Kw is only done by two or few specific suppliers...This was only for one (1) outdoor unit from three (3) quoted.”*
- d) It is being confirmed that the offer was rejected on the grounds that it was considered technically non-compliant, even after that the bidder was given the opportunity to rectify information. Specifically, it is being re-affirmed that the offer was found to be technically non-compliant on the following grounds:
 - i. light fixture type has a lamp rating of 1.5W and not as requested in the specifications of the tender document

- ii. No datasheets (requested in the Literature list) were submitted for
 - o light fixture type E1,
 - o electric water heater,
 - o network cabinet,
 - o UTP CAT6 cable,
 - o CCTV SYSTEM - Network Video Recorder (NVR),
 - o Manual Call Point (showing IP rating) and the internal beacons.
 - o UPS (battery - backup timing and the external maintenance bypass switch).
 - iii. Data Sheets for the New PIR Sensor Model shows that it is not recessed in false ceiling as per specifications.
 - iv. The cooling capacity of the VRF System is 22.4kW and not as per specifications of the tender document which shall be 22.7kW.
- e) In view of the above shortcomings, based on the original offer submitted and the consequent rectified information, the Evaluation Committee had no option other than to consider the offer as technically non-compliant. Moreover, the financial aspect of the same offer was not considered by the Evaluation Committee since bidder was deemed ineligible at the technical evaluation stage

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 witnesses duly summoned, will now consider Appellant's grievances. The Board opines that this case revolves around two main issues. The first being the Appellant's grievance on VRF system. The second being on the various issues relating to the Literature submitted by the Appellant. These will now be dealt with separately.

VRF System –

- a) The Appellant states that *“VRF System: Please note that one of the outdoor units was requested to have a minimum cooling capacity of 22.7 Kw. Please note that this type of VRF units with this range of 22.7Kw is only done by two or few specific suppliers. All other brands that are up to EU standard and can be installed in European countries have the range of 22.4Kw. When we had worked technically by our engineers, we found the indoor unites to be installed on that system is enough an can work on a 22.4Kw system.”*
- b) The Board notes that:
 - i. the Appellant's bid is therefore *ex admissis* not in compliance with the technical requirements of the tender dossier.
 - ii. As per the Appellant's own comments there are at least 2 suppliers of 22.7 Kw VRF systems in the Maltese islands, *“Please note that this type of VRF units with this range of 22.7Kw*

*is only done by two **or few** specific suppliers.”* (emphasis added). Therefore the number of 2 suppliers is not specific, there might be more!

- c) Therefore, this Board opines that if the Appellant felt aggrieved that such technical specification was limiting competition, an application under regulation 262 of the Public Procurement Regulations should have been done during the timeframes allowed by law.

Literature List / Documentation –

- a) The Board refers to Mr Buttigieg’s claims that *“the literature requested had been accepted in past tenders.....”*. This Board respectfully points out that each tender is assessed and evaluated on its own merits.
- b) The Board refers to the testimony under oath of Engineer Jeffrey Muscat whereby *“in fact there was an issue on the literature of all components and which did not meet the tender specifications”*. Here the Board makes reference to the fact that for a light fixture the Appellant failed to include the input power and daylight colour. On various other matters, no datasheets have been provided.

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 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

Dr Charles Cassar
Member