

PUBLIC CONTRACTS REVIEW BOARD

Case 1674 – SPD5/2021/048 – Works – Tender for the Construction and Refurbishment Works at Second Floor Level of the Court Services Agency in Valletta using Environmental Friendly Material and Practices

19th January 2022

The Board,

Having noted the letter of objection filed by Dr Joanne Farrugia on behalf of Saga Juris Advocates acting for and on behalf of iprojects Ltd, (hereinafter referred to as the appellant) filed on the 22nd November 2021;

Having also noted the letter of reply filed by Dr Chris Mizzi acting for the Court Services Agency (hereinafter referred to as the Contracting Authority) filed on the 2nd December 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 18th January 2022 hereunder-reproduced;

Minutes

PUBLIC CONTRACTS REVIEW BOARD

Case 1674 – SPD5/2021/048– Tender for the Construction and Refurbishment Works at Second Floor Level of the Court Services Agency in Valletta using Environmentally Friendly Material and Practices

The tender was issued on the 26th August 2021 and the closing date was the 1st October 2021. The value of the tender, excluding VAT, was € 280,218.

On the 22nd November 2021 Iprojects Ltd filed an appeal against the Court Services Agency as the Contracting Authority objecting to their disqualification on the grounds that their bid was considered to be technically not compliant.

A deposit of € 1,410 was paid.

There were four (4) bidders.

On the 18th 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 – Iprojects Ltd

Dr Franco Galea	Legal Representative
Dr Joanne Farrugia	Legal Representative
Mr Tonio Grixti	Representative

Contracting Authority – Court Services Agency

Dr Christopher Mizzi	Legal Representative
Mr David Mizzi	Chairperson Evaluation Committee
Ms Miriam Cassar	Secretary Evaluation Committee
Ms Naomi Cachia	Member Evaluation Committee
Mr Etienne Bartolo	Member Evaluation Committee
Mr Keith Magro	Member Evaluation Committee

Preferred Bidder – J Construction Ltd

Mr Mario Accardi	Representative
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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 Franco Galea Legal Representative for Iprojects Ltd said that the two points of appeal were regarding the certification of the key expert and the lack of a construction management plan.

Regarding the key expert the necessary documentation was submitted and the point at issue does not warrant disqualification in line with the decision in the AIB Brokers Case which deemed that the lack of a document should not prejudice a bidder.

The lack of a construction management plan should have been an instance where a clarification should have been sought. The Gantt chart presented indicates the work to be carried out and the timing which Appellant indicated that he was in agreement with and accepted them in line with the technical questionnaire – he was therefore compliant. The Contracting Authority retained the right of discretion according to the tender and hence any management plan could be altered.

Dr Christopher Mizzi Legal Representative for the Court Services Agency stated that the Authority was perplexed by the Appellant's arguments. There was no doubt that bidder had submitted an additional copy of the Gantt chart in lieu of the construction management plan which is a technical document and therefore comes within the ambit of Note 3. No rectification was therefore possible nor clarification as information was missing. The hands of the Tender Evaluation Committee (TEC) were tied.

Regarding the key expert the TEC sought a clarification as originally this requirement was left blank by bidder – when the document was submitted it was not in order and no further rectification was possible. It was only at the appeal letter stage that the MCAST qualification was introduced and it was not part of the original appeal.

Dr Galea said that the principle of self-limitation should not be used as justification for the TEC not to take decisions. The methodology of the work process was clear from the Gantt chart whilst the key expert was provided and any doubt about the qualifications were not sufficient to disqualify Appellant.

Dr Mizzi commented that the bidders submissions speaks for itself – if the two documents required were one and the same there would not have been a request for two documents. The document submitted on the key expert did not refer to MCAST but to a foreign qualification.

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 18th January 2022.

Having noted the objection filed by iprojects Ltd (hereinafter referred to as the Appellant) on 22nd November 2021, refers to the claims made by the same Appellant with regards to the tender of reference SPD5/2021/048 as case No. 1674 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Joanne Farrugia and Dr Franco Galea

Appearing for the Contracting Authority: Dr Chris Mizzi

Whereby, the Appellant contends that:

a) **Construction Management Plan –**

- i. The technical offer of the Company included a detailed construction management plan. This document clearly lists down all the works that were to be taken up by the Company during the weeks in which the works had to be executed. Such detailed construction

management plan tackles holistically all the different components in which the works are split and the Company ensured that the time-line presented to the Contracting Authority was realistic;

- ii. Without prejudice to the above, the Company respectfully submits that Note 3 to section C “Specifications” under Clause 5 entitled - Selection and Award Requirements states the following:

“No rectifications shall be allowed. Only clarifications on the submitted information may be requested. Tenderers will be requested to clarify the submitted information within five (5) working days from notification.”

This means that if the Contracting Authority felt that the documentation submitted by the Company was vague or had to be clarified by the Company, a request to this effect should have been made by the said Contracting Authority. Refusing to accept the tenderer's bid on the basis that a detailed construction management plan was not submitted when this in fact was submitted, goes against public procurement regulations and even against the Tender Dossier itself, particularly when considering that the Company was not given the opportunity to clarify its submissions before having its offer declared as unsuccessful, notwithstanding the fact that it was the cheapest offer.

b) **Key Expert –**

- i. On the 6th of October 2021, the evaluation committee informed the bidder in the most generic way that the Company failed to submit “documentation” relating to “a” key expert. In view of this, the Company resubmitted documentation relating to the key experts. However, on the 10th of November 2021, the Company was informed that its bid was unsuccessful because the bidder failed to provide NCFHE accreditation for the claimed certification. This was the first time that the Company was clearly informed that the requirement that it allegedly failed to fulfil was that relating to the NCFHE accreditation;
- ii. The Company respectfully brings to the attention of the Contracting Authority a diploma issued by the Malta College of Arts, Science and Technology in Construction Management. This course was externally verified by the College of Estate Management, UK. However, the diploma was issued by MCAST, which is a Maltese Educational Institution. This diploma constitutes a Key Expert MQF Level 4 qualification, which does not need NCFHE accreditation since such qualification is issued by a Maltese Education Institution.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 2nd December 2021 and its verbal submission during the virtual hearing held on 18th January 2022, in that:

a) **Construction Management Plan –**

- i. Under this heading the defendant would like to point out first and foremost that bidders were required to submit the Tenderer's Technical Offer through the prescribed Tender Response Format. The Technical Offer template was published as one of the forms annexed to the Tender Document published on the Epps as well. The Technical Offer form clearly instructs the bidder what information needs to be submitted that would in its totality constitute the Technical Offer.
- ii. Among the various requirements, the Technical Offer required a Detailed Construction Management Plan denoted as Note 3 as is the prevalent condition for all the technical offer except for Key Experts. Here below find an extract of the header section meant for the Detailed Construction Management Plan as part of the Technical Offer.
DETAILED CONSTRUCTION MANAGEMENT PLAN (Note 3)
Tenderers are to include here Detailed Construction Management Plan in relation to this tender. This does not limit in any way the Contracting Authority from modifying the works or progress of works according to the Contracting Authority's exigencies at the time of modification.
- iii. Under this section the bidder submitted a Gantt Chart and not a Construction Management Plan. The same Gantt Chart was also resubmitted in the next page of the Technical Offer being the section requiring bidders to submit a Detailed Programme of Works (Gantt Chart) which had to include all different work stages as outlined in the tender.
- iv. The evaluation committee was satisfied of the latter requirement being that of a Gantt Chart but the same information and effectively the same Gantt Chart could never satisfy the information meant to be presented in a Detailed Construction Management Plan. Therefore, the evaluation committee had no option but to state that the Detailed Construction Management Plan was not submitted since the information submitted under that heading did not amount to a Detailed Construction Management Plan, but a Gantt Chart which was only suitable enough for the Programme of Works section.
- v. The evaluation committee could not carry out a rectification exercise on the Detailed Construction Management Plan since this information was earmarked as 'Note 3' and therefore only clarifications could be entertained. In this scenario it was sufficiently clear for the evaluation committee that the information requested was missing or at best incorrect thereby only remedied through a rectification exercise which was not possible to propose.

b) **Key Expert –**

- i. With respect to the other ground for this objection in relation to the Key Experts, the defendant would like to first make some factual analysis of what exactly occurred on the matter which led to the disqualification on the lack of submission of the proper documentation for the key expert. The below is a list of events which the defendant would like to point out:
 - a. In the initial submission bidder did not submit Key Experts as requested in the Tenderer's Technical Offer Form;
 - b. Key Experts can be rectified (Note 2) - thereby evaluation committee requested a rectification for all the missing information through correspondence dated 6th October 2021. The pertinent text of the rectification is being reproduced hereunder for ease of reference: Key experts were not submitted. In this regards you are being requested to fill-in and submit key experts form together with the signed forms of each key expert. Furthermore, if key experts have a foreign qualification, NCFHE accreditation is needed.
 - c. It is therefore not true as submitted in the appellant's objection that the correspondence was generic and related to "a" key expert. The rectification is symptomatic to the fact that the bidder did not submit any information for Key Experts at all. Therefore, the request for rectification had to comprehend all Key Experts information including signed declarations for each Key Expert and Key Experts Form which was also not submitted;
 - d. The NCFHE requirement for foreign qualifications was mentioned in the rectification request as quoted above and not in hindsight in the letter of disqualification as purported in the objection by the objector;
 - e. Following the rectification request bidder submitted information for all Key Experts however evaluation committee had some reservations on the submitted information;
 - f. The issue revolved around the Foreman and Project Manager Key Experts, which posts were meant to be satisfied by the same person being Mario Grixti;
 - g. No qualifications were submitted for Mr. Mario Grixti, only the CV and Key Expert Declaration were submitted;
 - h. The CV made reference to a Project Management Diploma recognized by Reading University. The CV and the rest of the submission did not make any reference to an MCAST qualification for Diploma in Construction Management,
 - i. Since the only suitable qualification mentioned in the CV was a foreign qualification NCFHE accreditation was required;
 - j. The evaluation committee could not rectify second time round on Key Experts missing information since this is prohibited and therefore had to disqualify bidder;

- k. MCAST qualification for Diploma in Construction Management was only mentioned and submitted for the first time during this objection, thereby the evaluation committee could never decide on this bit of information.
- ii. Further to the above the defendant would like to emphasize that a rectification exercise was effectively carried out (6th October 2021 correspondence) and bidder was given the opportunity to submit all the necessary information. The objector's argument is that a further rectification should have been made possible since the information to be submitted would in no way affect the overall bid. This is a misnomer since the tender document specifically excludes and prohibits second-time round requests for rectifications dealing with the same shortcomings.

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) **Construction Management Plan –**

- i. This Board notes that in the section of the tender where the prospective bidder, now Appellant, was requested to submit a 'Detailed Construction Management Plan', he submitted the same Gantt Chart which was required to be submitted in another subsequent section of the bid.
- ii. This Board agrees with the interpretation given by the Evaluation Committee, in that this submission was not what was required from prospective bidders. A Clarification would certainly not have solved the issued at hand.
- iii. Even though the drafting of a 'Detailed Construction Management Plan' is not regulated by any specific law and / or manual, it certainly is something different to what a Gantt Chart is used for. There might be similarities and / or inter-dependencies in some aspects, but this Board opines that these should be considered as two (2) separate documents and hence the submission by the Appellant was erroneous in this regard.
- iv. The Board opines that such a 'mistake' could not be rectified, since this specific section of the tender falls under Note 3.

Therefore, this Board rejects Appellant's first grievance.

b) **Key Expert**

- i. With regards to this second grievance, this Board agrees with the argumentation as brought forward by the Appellant, whereby the Court of Appeal case AIB Insurance Brokers Limited vs Awtorita dwar it-Trasport ta' Malta; Direttur Generali tad-Dipartment tal-Kuntratti; u Osprey Insurance Brokers Co Limited dated 27th October 2021 is very much relevant to this specific grievance.

- ii. This Board opines that such documentation (NCFHE accreditation) as presented by the Appellant during these proceedings, would not affect the substance of the bid placed by the tenderer.
- iii. The Board takes this opportunity to distinguish between ‘documentation’ which is only required to fulfil criteria which does not affect the tender offer *per se* (reference to this second grievance of the Appellant company) and ‘information’ which would affect the substance of the tenderer’s bid (reference to the first grievance of the Appellant company).

Therefore, this Board upholds Appellant’s second grievance.

The Board,

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

- a) Whilst upholding Appellant’s second grievance it does not uphold the rest of the 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 half the deposit paid by Appellant to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Dr Charles Cassar
Member