

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1680 – SPD7/2021/033 – Supply, Delivery and Assembly of Furniture for the Financial Intelligence Analysis Unit (FIAU) Offices - Lot 1 and Lot 2**

7<sup>th</sup> February 2022

The Board,

Having noted the letter of objection filed by Dr Carl Grech acting for and on behalf of Cieffe Joinery Limited, (hereinafter referred to as the appellant) filed on the 20<sup>th</sup> December 2021;

Having also noted the letter of reply filed by Dr Mark Refalo on behalf of Refalo Advocates acting for and on behalf of Financial Intelligence Analysis Unit (FIAU) (hereinafter referred to as the Contracting Authority) filed on the 29<sup>th</sup> December 2021;

Having heard and evaluated the testimony of the witness Mr Johann Farrugia (Representative of Cieffe Joinery Ltd) as summoned by Dr Carl Grech acting for of Cieffe Joinery Limited;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 1<sup>st</sup> February 2022 hereunder-reproduced;

#### **Minutes**

#### **Case 1680 – SPD7/2021/033 – Supply, Delivery and Assembly of Furniture for the Financial Intelligence Analysis Unit (FIAU) Offices. (Lots 1 & 2)**

The tender was issued on the 8<sup>th</sup> July 2021 and the closing date was the 6<sup>th</sup> August 2021. The value of the tender, excluding VAT, was € 298,350 on Lot 1 and € 9,000 on Lot 2

On the 20<sup>th</sup> December 2021 Cieffe Joinery Ltd filed an appeal against Financial Intelligence Analysis Unit as the Contracting Authority objecting to their disqualification on the grounds that their tender was deemed to be technically not compliant.

A deposit of € 1,491.75 was paid on Lot 1 and € 400 on Lot 2.

There were twelve (12) bidders on Lot 1 and fourteen (14) bidders on Lot 2.

On the 1<sup>st</sup> February 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 – Cieffe Joinery Ltd**

Dr Carl Grech  
Mr George Grima

Legal Representative  
Representative

**Contracting Authority – Financial Intelligence Analysis Unit**

Dr Mark Refalo  
Ms Audrey Spiteri  
Mr Mario Bugeja

Legal Representative  
Member Evaluation Committee  
Representative

**Preferred bidder – F.X.Borg Furniture Ltd**

Dr Kris Borg  
Mr Joe Borg  
Ms Jenny Cassar

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 Carl Grech Legal Representative for Cieffe Joinery Ltd said Appellant was excluded as technically not compliant as certain certificates were claimed to be missing from its submission. This decision was not proportional as certificates could be obtained after the furniture was manufactured. Appellant was prepared to provide a competent person to certify that the tender requirements were met. The price of ready made furniture was higher than this offer and it did not make sense to exclude the cheapest bid.

Dr Mark Refalo Legal Representative for the Financial Intelligence Analysis Unit (FIAU) said that this was a clear case where the Appellant should have sought a precontractual remedy to clarify this point instead of proceeding to bid.

Mr Johann Farrugia (225874M) called as a witness by Appellant testified on oath that when his Company studied the tender they realized that it was asking for certificates of Technical Standards or Equivalent and they therefore decided to appoint a competent person to certify compliance with tender requirements. The tender clearly offered alternatives.

Questioned by Dr Refalo witness stated that the Company did not feel the need to seek clarification as the alternative was clearly available in the tender.

Dr Kris Borg Legal Representative for F.X. Borg Furniture Ltd said that the tender does not give alternatives and there was the requirement to produce certificates even when the furniture was custom-made. Certification was usually carried out prior to manufacturing an order.

Dr Carl Grech re-iterated that the tender required the furniture to be certified. There were no disadvantages if certificates were produced after production of the order.

Dr Refalo said that the standard required was a common standard as it was type equivalent – even a favourable price did not mean that the tender requirements should not be met.

The Chairman said that since the appeals on Lots 1 and 2 were identical it should be recorded that the Minutes cover both appeals. He then thanked the parties for their submissions and declared the hearing closed.

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 1<sup>st</sup> February 2022.

Having noted the objection filed by Cieffe Joinery Limited (hereinafter referred to as the Appellant) on 20<sup>th</sup> December 2021, refers to the claims made by the same Appellant with regards to the tender of reference SPD/2021/033 listed as case No. 1680 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Carl Grech

Appearing for the Contracting Authority: Dr Mark Refalo

Appearing for the Preferred Bidder: Dr Kris Borg

Whereby, the Appellant, in their Letter of Objection, contend that:

- a) As appears from the description of the furniture which is required to be supplied, delivered and assembled in terms of both Lot 1 and Lot 2 of this tender, the Contracting Authority required very specific types of furniture with very specific dimensions, structural and finish requirements, as well as a minimum of ten different options of natural wood finish. The tenderer was to provide these highly specific requirements in various clusters, all as detailed in the technical specifications. The European Standards are technical specifications defining requirements for products, production processes, services or test-methods. These specifications are voluntary. They are developed by industry and market actors following some basic principles such as consensus, openness,

transparency and non-discrimination. These Standards ensure interoperability and safety, reduce costs and facilitate companies' integration in the value chain and trade. Yet it stands to reason that certification in terms of such standards for custom-made products can only be provided once such products have actually been built. In the light of this, the Tenderer submitted technical drawings, attesting that the various items would be built in accordance with the applicable EN Standards or equivalent, which is what the tenderers were required, and could at this stage submit. Yet, the tenderer would only be in a position to provide this certification at a subsequent stage, once the items have actually been built, and can therefore be tested in accordance with those standards. This was confirmed as well by the tenderer following the clarification request made by the evaluation committee. It was therefore not proportionate that the tender document, and eventually the evaluation committee, would request for the tenderer to provide this certification, at tendering stage for a certificate that could, in the event that the furniture was going to be custom built, only logically be provided at a subsequent stage.

- b) Additionally, by creating the requirement to provide this certification the Contracting Authority was not acting proportionately as this request illegally excluded tenderers who could have been technically compliant, as this request unfairly gave an advantage to other parties, who as is evident from the offers submitted, could only then participate with items of furniture that are already in production, but at higher rates. The acceptability and the appraisal of bids submitted by advantaged parties can generate a major negative impact on competition - especially as regards its technical specifications, the method for the evaluation of bids, and the award criteria. Thus, while the evaluation committee may request clarifications from tenderers, it cannot request documentation that would have, the effect of distorting competition and should not result in a violation of the principles of non-discrimination and transparency.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 29<sup>th</sup> December 2021 and its verbal submission during the virtual hearing held on 1<sup>st</sup> February 2022, in that:

- a) The objector, Cieffe, objects on the basis that according to it the ITT should not have requested an EN Standards Certificates or equivalent for the proposed furniture. The bid was deficient because Cieffe failed to understand the nature and technical requirements of the project tendered for. It is clear from this objection that Cieffe has failed to understand and appreciate the nature and technical requirements of the tender in question and just for that reason its offer have (sic) been rejected. This is stated because the tender in question was not for the design and supply of be-spoke office furniture but rather for the supply of defined and definite designs each of which is ALREADY confirmed to be in accordance with the specified EN technical standards. Cieffe seems to believe that the designs and specifications of the requisite furniture was up for debate following the award of the tender, when this is not so.

- b) In the interests of celerity the FIAU requested pre-existing and already certified designs that are compatible with the technical specifications provided in the tender document. The ITT makes it clear that the FIAU did not want proposed designs to obtain EN Certification after the bid is awarded, and that therefore such certification had to exist either at offer stage or during Evaluation stage by means of a clarification or rectification. In this regard, Cieffe was given the opportunity to rectify the shortcoming and provide the EN certificates or equivalent as per Clarification Request issued on the 3rd September 2021.
- c) The tender document requested EN standards certificates, however the Contracting Authority gave the opportunity to Economic Operators to submit any other certificates equivalent to the listed EN standards. The EN standards certificates or equivalent were reasonably requested given the Estimated Procurement Value (excluding potential costs) of the tender being that of four hundred nineteen thousand and five hundred Euro (€419,500) excl. VAT, and that the FIAU is investing in a long-term project and durable furniture for long-term investment is a prerequisite. In order to ensure that the Contracting Authority is not distorting competition, the Contracting Authority carried out market research and it was determined that the requested specifications were appropriate, fair, reasonable and easily available. Furthermore, the EN standards certificates also help to ensure that a common factor is included in the specifications to compare like with like and ensure a fair evaluation of the submitted bids. Hence, EN standard certificates were included to ensure proportionality, non-discrimination, and fairness. The whole procurement process was carried out in a transparent manner on the tenders website and the call for tenders was even published on the OJEU to ensure an open market as much as possible. Furthermore, in order to encourage competition, the tender was divided into four (4) lots to give the opportunity to different economic operators to participate in this open call.
- d) Failure to request a pre-contractual remedy or clarification prior to submitting the tender. In any case and without prejudice to the above, Cieffe accepted the condition as being valid by submitting an offer without requesting a pre-contractual remedy for the ITT in terms of regulation 262 of the Public Procurement Regulations. Cieffe did not even request a clarification in relation to the matter. With all due respect it is not possible to retroactively change technical conditions imposed in an ITT after bids were presented and the winning bid made in accordance to such technical conditions. Doing so would be giving an unfair and non-proportional advantage to negligent bidders.

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) This Board will initially consider whether ‘bespoke’ / ‘custom made’ furniture was ‘allowed’ by the tender dossier or otherwise.

i. The Appellant in its Objection Letter states: *“It was therefore not proportionate that the tender document, and eventually the evaluation committee, would request for the tenderer to provide this certification, at tendering stage for a certificate that could, in the event that the furniture was going to be custom built, only logically be provided at a subsequent stage.”*

ii. The Contracting Authority in its Reasoned Letter of Reply states *“This is stated because the tender in question **was not for the design and supply of bespoke office furniture** but rather for the supply of defined and definite designs each of which is ALREADY confirmed to be in accordance with the specified EN technical standards”* (bold emphasis added)

iii. The Tender Dossier refers to ‘bespoke’ or ‘custom-made’ furniture in at least 3 occasions.

1) Section 2 – Special Conditions - Article 7.4 states *“No documents or drawings are required to be approved by the Contracting Authority unless bespoke furniture will be manufactured by the Contractor. In this case, the Contractor shall supply Fabrication Drawings to the Project Supervisor as instructed by the latter. The Project Supervisor shall approve or otherwise instruct the Contractor within a period of 15 calendar days.”*

2) Section 2 – Special Conditions – Article 14.1 states *“No drawings or diagrams are required unless bespoke furniture will be manufactured by the Contractor. In this case, the Contractor shall supply the Drawings to the Project Manager as instructed by the latter and within five (5) working days. Drawings shall be approved by the Project Manager.”*

3) Section 3 – Technical Specifications – General Note 1 states *“The scope of this tender is the supply and installation of furniture as specified hereunder. All items and any designs for custom-made furniture shall be approved before manufacturing.”*

iv. Hence it is this Board’s opinion that there should be no doubt whatsoever that the tender dossier did in fact cater for the possibility that prospective tenderers could offer ‘bespoke’ and / or ‘custom made’ furniture to the Contracting Authority.

b) Secondly this Board will delve into the **“EN certificates or equivalent”** issue. The Rejection Letter sent to the Appellant, for Lot 1, stated: *“The bidder clarified the missing information about the offered products but did not submit any EN certificates or equivalent requested in Section 1 Article 5 (c)(ii)”* while for Lot 2, it stated *“A clarification request was issued on 3<sup>rd</sup> September 2021. Economic Operator’s reply to the clarification was incomplete as EN standards certificates or equivalent were not submitted for.....”*

i. It is to be also noted that the Appellant, on 12<sup>th</sup> September 2021, presented a statement to the Contracting Authority declaring that *“... our suppliers are all Iso (sic) Certified and their products comply with eb respective EN Standards. Kindly refer to enclosed ISO Certificates..... We hereby also declare, that all furniture shall be manufactured as per EN Standards referred to in the tender..... We will be engaging Jsquared Advertising Solutions’, to certify and conduct quality checks as per relative standards, both during manufacturing and also on*

*completion..... Thus, all our products will be manufactured and delivered to relevant standards as requested in the tender document.”*

- ii. The Board notes, that since the Appellant was offering ‘custom made’ furniture, he still showed and produced evidence in the clarifications stage that all his suppliers are ISO certified and also offered to engage a third-party specialist to certify and conduct quality checks up to EN standards level. This, in the Board’s opinion, does in fact meet the “or equivalent” aspect of the tender documentation if one were to keep the proportionality principle in mind. If the Contracting Authority would have expected EN certificate only and immediately at tendering stage, it needed to be clearer in its drafting of the tender dossier.
- c) Finally, this Board will delve into the matter of the point raised by the Contracting Authority in relation to Regulation 262. It is this Board’s opinion, that the tender document was clear and unambiguous when 1) it referred on multiple occasion to ‘bespoke’ or ‘custom made’ furniture and 2) it required EN Certificates ***or equivalent***. Hence, the issue of a Pre-contractual remedy does not arise if the prospective bidder, now Appellant, intended to proceed with proposing ‘custom made’ furniture to the Contracting Authority.

Therefore, this Board upholds Appellant’s grievances.

**In conclusion this Board;**

Having evaluated all the above and based on the above considerations, concludes and decides on both Lots 1 and 2:

- a) To uphold the Appellant’s concerns and grievances;
- b) To cancel the ‘Notice of Award’ letters dated 9<sup>th</sup> December 2021;
- c) To cancel the Letters of Rejection dated 9<sup>th</sup> December sent to Cieffe Joinery Ltd;
- d) To order the contracting authority to re-evaluate the bids received from Cieffe Joinery Ltd in the tenders 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 these Letters of Objection, directs that the deposits be refunded to the Appellant.

**Mr Kenneth Swain**  
Chairman

**Dr Charles Cassar**  
Member

**Mr Lawrence Aniclleri**  
Member