

PUBLIC CONTRACTS REVIEW BOARD

Case 1687 – CT2244/2021 – Tender for Professional Services of an Architect for General Consultancy, Concert Hall, Extension of Costume House and Restoration of Priory of Navarre Façade at Teatru Manoel (Lot 1)

7th March 2022

The Board,

Having noted the letter of objection filed by Mr Charles Buhagiar acting for and on behalf of Med Design Associates Ltd, (hereinafter referred to as the appellant) filed on the 28th January 2022;

Having also noted the letter of reply filed by Ms Diane Degabriele acting for and on behalf of Manoel Theatre (hereinafter referred to as the Contracting Authority) filed on the 8th February 2022;

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 3rd March 2022 hereunder-reproduced;

Minutes

Case 1687 – CT 2244/2021 – Tender for Professional Services of an Architect for General Consultancy, Concert Hall, Extension of Costume House and Restoration of Priory of Navarre Façade at Teatru Manoel – Lot 1

The tender was issued on the 18th August 2021 and the closing date was the 5th October 2021. The value of the tender for this Lot, excluding VAT, was € 530,000.

On the 28th January 2022 Med Design Associates Ltd filed an appeal against Teatru Manoel as the Contracting Authority objecting to their disqualification on the grounds that their tender was not administratively compliant.

A deposit of € 2,650 was paid.

There were eleven(11) bidders.

On the 3rd March 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera and Mr Richard Matrenza as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Med Design Associates Ltd

Perit Charles Buhagiar Representative

Contracting Authority – Teatru Manoel

Dr Charlon Gouder	Legal Representative
Ms Penelope Louise Ciangura	Member Evaluation Committee
Ms Kate Fenech Field	Member Evaluation Committee
Mr Brian Bonnici	Member Evaluation Committee

Preferred bidder – EMDP

Mr Mariello Spiteri 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.

The Secretary of the Board requested that it be recorded that one of the members of the Evaluation Board was his daughter. The Chairman noted that the Secretary did not take part in the deliberations of the Board so this matter will not affect the decision on the tender. He then invited submissions.

Perit Charles Buhagiar Representative for Med Design Associates Ltd requested clarification on how the offer was evaluated.

Dr Charlon Gouder Legal Representative for Teatru Manoel said that by letter dated 22nd January 2022 the Appellant had raised a grievance on the price of the preferred award. This was the only grievance raised and a remedy thereon requested. Everything in this appeal evolves on this point and the question was if the exclusion on the price was justified.

Perit Buhagiar said that the reason for the disqualification was not known until the appeal was submitted hence Appellant was not in a position to know if there were other shortcomings.

Dr Gouder disagreed and stated that the Department of Contracts on the 21st January 2022 had informed Appellant that the offer had been found to be administratively non-compliant as the rectification issued on the 12th October 2021 was not responded to. No attempt was made to deal with the points raised in that clarification. Also to be noted, the tender was on BPQR basis not solely on price.

Perit Buhagiar said that the clarification was not attended to as it was only noted late due to being traced in the spam file. The so-called technical points raised by the Authority were minor ones which could easily have been dealt with.

Dr Gouder re-iterated that although the Authority had clearly indicated the reasons for disqualification Appellant had decided to base his appeal solely on price rather than on the stated reasons. It was clear that information was missing in the submissions and that was enough to disqualify the bid. Reference was made to PCRB Case 1146 dealing with self-limitation and transparency. Appellant themselves confirmed that the clarification was not replied to and this left the Authority with no alternative except disqualification.

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 3rd March 2022.

Having noted the objection filed by Med Design Associates Ltd (hereinafter referred to as the Appellant) on 28th January 2022, refers to the claims made by the same Appellant with regards to the tender of reference CT2244/2021 listed as case No. 1687 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Mr Charles Buhagiar

Appearing for the Contracting Authority: Dr Charlon Gouder

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

- a) Our financial offer at €345,000 is the cheapest offer submitted whilst we are fully compliant with the technical requirements of this tender.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 8th February 2022 and its verbal submission during the virtual hearing held on 3rd March 2022, in that:

- a) The reason provided in the rejection decision was: missing information as it clearly results from the decision itself, the objector never replied to the rectification issued on the 12th of October 2021. With such rectification the objector had every opportunity to regulate his position but nonetheless the objector chose to remain passive and silent.

- b) Furthermore and without prejudice to the above, the letter of objection was based solely on the price but the decision for non-compliance had nothing to do with the price. The evaluation committee notes that the letter of objection of the 28th January 2022 contains no reference to the actual reasons for non-compliance as provided by the Contracting Authority and this despite the fact that the objector had every opportunity to make submissions in relation to same in his letter of objection.

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 will immediately make reference to regulation 270 of the Public Procurement Regulations ("PPR") whereby it is stated: *"Where the estimated value of the public contract meets or exceeds five thousand euro (€5,000) any tenderer or candidate concerned, or any person, having or having had an interest or who has been harmed or risks being harmed by an alleged infringement or by any decision taken including a proposed award in obtaining a contract, a rejection of a tender or a cancellation of a call for tender after the lapse of the publication period, **may file an appeal by means of an objection before the Public Contracts Review Board, which shall contain in a very clear manner the reasons for their complaints.**"* (bold & underline emphasis added). The Board notes that the only grievance of the Appellant, in its Letter of Objection dated 28th January 2022, revolves around its financial offer of €345,000 and not on its Administrative and / or Technical compliance, as per the reason for rejection which was issued by the Contracting Authority on 21st January 2022.
- b) Reference is also made to the argumentation brought forward by Appellant during the public hearing whereby it was stated that the reason for disqualification was not known until the appeal was submitted. However, this Board notes that it was the same Appellant who in his objection letter dated 28th January 2022 included within it as Annex 1, the "Rejection Letter" sent to it by the Department of Contracts dated 21st January 2022 which stated *"Economic Operator failed to submit start date of submitted projects and the description of the works required as per Clause 5 C i) a) Technical and Professional Ability. A Rectification for the above was issued on the 12th October 2021 and no response was received within the deadline."* Therefore, this Board notes that the Appellant was or should have been aware of the reason for disqualification prior to him filing this appeal before this Board.
- c) None-the-less, it is still the prospective bidder's responsibility to act in a diligent manner as stipulated in the General Rules Governing Tenders, more specifically paragraph 16.1 *"The Evaluation Committee will check the compliance of tender submissions with the instructions given in the procurement documents, and in particular the documentation submitted in respect of the requirements detailed in Clause 51(A) of the Instructions to Tenderers. The Evaluation Committee can request clarifications and rectifications, in which case the Evaluation Committee shall obtain the prior approval of the Director General (Contracts)/Ministerial Procurement/ Departmental Contracts Committee. In the case where a rectification is requested this shall be regulated*

by Notes 1 and 2 in Clause 5 of the Instructions to Tenderers. **Rectification/s must be submitted within five (5) working days from notification, and will be free of charge: failure to comply shall result in the tender offer not being considered any further.**” (bold & underline emphasis added)

In view of the matters above, this Board does not uphold the grievance of the Appellant.

In conclusion this 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 to EMPD Ltd,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Ms Stephanie Scicluna Laiviera
Member

Mr Richard Matrenza
Member