

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1688 – CT2372/2020 – Tender for excavation and construction of a new social housing block at plot 77, Triq Napuljun Dingli, Mellieha A**

**11<sup>th</sup> March 2022**

The Board,

Having noted the letter of objection filed by Dr Jonathan Thompson and Dr Marlon Borg on behalf of DF Advocates acting for and on behalf of FES Projects Ltd, (hereinafter referred to as the appellant) filed on the 28<sup>th</sup> January 2022;

Having also noted the letter of reply filed by Dr Ivan Gatt on behalf of GTG Advocates acting for Social Projects Management Ltd (hereinafter referred to as the Contracting Authority) filed on the 2<sup>nd</sup> February 2022;

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 8<sup>th</sup> March 2022 hereunder-reproduced.

#### **Minutes**

#### **Case 1688 – CT 2372/2020 – Tender for Excavation and Construction of a new Social Housing Block at Plot 77, Triq Napuljun Dingli, Mellieha A**

The tender was issued on the 14<sup>th</sup> January 2021 and the closing date was the 9<sup>th</sup> March 2021. The value of the tender, excluding VAT, was € 186,562.80.

On the 28<sup>th</sup> January 2022 FES Projects Ltd filed an appeal against Social Projects Management (SPM) Ltd as the Contracting Authority objecting to their disqualification on the grounds that their tender was not administratively compliant and additionally was also technically non-compliant.

A deposit of € 933 was paid.

There were five (5) bidders.

On the 8<sup>th</sup> March 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 – FES Projects Ltd**

Dr Jonathan Thompson

Legal Representative

Dr Marlon Borg  
Mr Leon Chetcuti

Legal Representative  
Representative

### **Contracting Authority – Social Projects Management Ltd**

Dr Ivan Gatt  
Mr Patrick Vella

Legal Representative  
Representative

### **Preferred Bidder – Pullicin Developers**

Mr Dylan Pullicino

Representative

### **Department of Contracts**

Dr Mark Anthony Debono

Legal 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.

Dr Jonathan Thompson Legal Representative for FES Projects Ltd said that the disqualification was being contested on two grounds and both these grounds should have been clarified to keep the offer alive. The first reason was in regard to the specification on machinery where a clarification was sought to provide further details. Here bidder assumed that the clarification was on the specification of the machinery required in the tender and not on the number of vehicles of a certain type. If there was any doubt then the Tender Evaluation Committee (TEC) should have made a further request to confirm the submission.

There was ambiguity in the TEC request which could have been easily resolved by a further clarification.

The second reason for the disqualification was about the waterproofing material which in the context of the tender is minimal and a request for clarification would have resolved any doubt. In PCRB Case 1432 the Board noted that even on a Note 3 item it is within the ambit of proportionality to seek clarity – the Contracting Authority has the discretion not to exclude. The waterproofing cannot be taken in isolation and if there was any doubt about the quality of the product offered the Authority should have asked for technical literature – this is well within the Public Procurement laws and Appellant should not be excluded.

Dr Ivan Gatt Legal Representative for Social Projects Management Ltd agreed that the appeal was on two aspects. The key to the argument is the principle of proportionality. On the first reason the Authority used a clarification but the bidder was still erroneous in its reply – proportionality was applied and one cannot expect further clarifications.

The second reason is a technical one. The data provided is locked as Note 3 and one cannot have a situation where data is replaced. The product offered on the waterproofing product is totally not as requested – even if minimal it still has to be respected. There is no ambiguity in what was requested. If the Authority had given the opportunity to clarify Appellant’s offer it would have been the cheapest but this argument does not hold water as the opportunity could not be given to just one bidder.

Dr Thompson stated that what was requested in the clarification on the number of vehicles was a technical information matter. Bidder did not realise that it was the number of vehicles that the Authority wanted clarified, and this is where proportionality comes in. On the second point of the appeal there is the ambiguity as to what was offered had nothing to do with what was requested; hence the ambiguity which on proportionality principles should have been clarified. The Appellant had submitted the cheapest offer and minimal differences should be allowed to maintain open competition. Appellant should not have been disqualified.

Dr Gatt re-iterated that there is no basis for the claim that Appellant’s bid was the lowest – what was offered was not what was asked for regarding the waterproofing material whilst the reply to the clarification did not conform to what the TEC asked clearly and correctly.

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 8<sup>th</sup> March 2022.

Having noted the objection filed by FES Projects Ltd (hereinafter referred to as the Appellant) on 28<sup>th</sup> January 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT2372/2020 listed as case No. 1688 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Jonathan Thompson & Dr Marlon Borg

Appearing for the Contracting Authority: Dr Ivan Gatt

Whereby, the Appellant contends that:

- a) The Appellant is formally objecting to the decision taken by the Contracting Authority to reject the Appellant's offer on the basis that said offer *“was deemed administrative not compliant as he submitted details of two (2) Ready Mix Concrete Trucks whilst in the Technical and Professional ability Section I - Instructions to tenderers it was requested three (3) Ready Mix Concrete trucks. Therefore, his offer was not considered further.”* Additionally, the offer by FES *“was deemed also Technically not compliant as bidder offered a cement-based mortar water proofer whilst in the technical specifications Spec C- 11 Item 11.1 the waterproofing system must be re-enforced elastomer bituminous emulsion”*
- b) **Alleged noncompliance with Technical and Professional Ability section -** That at the outset, it must be pointed out to this Honourable Board that the “Technical and Professional Ability” section falls under Note 2 of the tender document issued by the Contracting Authority, which holds that: *“Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within five (5) working days from notification.”* That whilst a clarification/rectification was sought by the Contracting Authority on the 16<sup>th</sup> April 2021 in relation to *“details of relevant plant and equipment”*, the rectification and / or clarification submitted by FES to the Contracting Authority on the same day i.e. the 16<sup>th</sup> April 2021 contained an oversight / clerical error where the details of two (2) Ready Mix Concrete Trucks were submitted instead of three (3). In actual fact, the appellant should have mentioned that there are two (2) of the 10m3 IVECO Trakker Euro 5 Ready Mix Concrete Trucks available for use and not one (1).
- c) **Alleged non-compliance with Technical Spec C-11 Item 11.1 -** That the failure by the appellant to quote a re-enforced elastomer bituminous emulsion water proofer was an oversight / clerical error which would have easily been clarified by means of a clarification which was never requested by the Contracting Authority and never brought to the attention of the appellant before the letter of the 18th January 2022.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 2<sup>nd</sup> February 2022 and its verbal submission during the virtual hearing held on 8<sup>th</sup> March 2022, in that:

- a) The grounds of objection raised by FES are mainly the following:
- i. Administrative non - compliant - FES claims that the contracting authority in its adjudication process acted incorrectly when it deemed that the submission of 2 Ready Mix Concrete Mixers instead of 3 rendered the submission non-complaint(sic), (Note2)
  - ii. Technically non-complaint - FES claims that the mistake in nomenclature of the product was not a justifiable reason to render the submission non- complaint.(sic) (Note 3)

The principle of proportionality is the underlying basis in support of both grounds of objection. FES claims that the two above-mentioned grounds of objection are simple oversights which (by application of the principle of proportionality) could have easily been explained, rectified, or clarified had the contracting authority requested this when processing the bidder's submissions.

It must be said that SPM is not disputing the principle of proportionality *per se* but is disputing the applicability of the principle (as expounded by FES) in relation to the grounds of objection raised by FES.

- b) **Administrative non-compliance:** - it is important to point out that in the initial process of adjudication, the contracting authority noted inaccuracies in the submitted in relation to the details of the relevant plant and equipment (Note 2). A letter dated the 16th of April 2021 was sent to FES requesting ratification and giving the bidder the opportunity to come in line with the required terms and conditions. The objector despite having been given this chance to conform with the requirements, still failed to provide the necessary details, specifications and itemised list required. It must be said that once FES filed its response to the ratification request then FES cannot reasonably and justifiably expect to receive yet another (repeated) request for clarification on the same subject matter. FES is wrongly applying the principle of proportionality. Its reliance on this principle in these circumstances cannot seriously be hinged on the expectation of unlimited and repeated letters/requests for clarification.
- c) **Technical non-compliance:** - FES not only failed the first (administrative) stage of the adjudicating process but also failed this second stage, Technical information once submitted cannot be modified nor adjusted. The Tenderer's Technical Offer ((Note 3) referred to a product by the name "Pick". From an examination of the product's technical specification, it clearly results that the product do(sic) not tally/conform with the requested tender product i.e. "the water proofing system must be re-enforced elastomer bituminous emulsion" thus leading to the logical and only result of non - compliance from the technical perspective too. It must be noted that once the financial data is submitted there can be no subsequent changes in the product/s offered nor in the relative pricing. Once submitted these aspects are "locked-in" and cannot be altered. Understandably so, as otherwise there will be total chaos with bidders constantly manoeuvring and expecting clarification to make changes and jostling for the best position to win the bid. In this case too, the reliance on the principle of proportionality is incorrectly applied, It must be said that FES is attempting to equate the so-called error as an error of a clerical nature. By no stretch of the imagination can this issue be termed as an error. It is simply a submission of a different product to that requested in the tender document.

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) **Alleged noncompliance with Technical and Professional Ability section (Administrative non-compliance)** – With regards to the first grievance of the Appellant, this Board agrees with the Appellant that the section under consideration falls within the remits of Note 2. It is also being noted that the Evaluation Committee, during its evaluation, felt it necessary to issue a rectification

request to the Appellant as per Annex II to submit list of Tools, Plant and Technical equipment. The Appellant duly responded within the stipulated timeframes, however his reply was still not in full compliance with the requirements of the Tender Dossier. Hence this Board, duly notes that in this specific case, the Contracting Authority correctly availed itself of the tools within its possession (clarification and / or rectification mechanism), and it was the lack of proper reply from the Appellant which resulted in its eventual administrative non-compliance. Given that the Contracting Authority had exhausted all the tools available to it and “*Requests for Clarifications and / or Rectifications concerning a previous request dealing with the same shortcoming shall not be entertained*” as per ‘Notes to Clause 5’, this Board does not uphold this grievance of the Appellant.

- b) **Alleged non-compliance with Technical Spec C-11 Item 11.1 (Technical non-compliance)**
- With regards to the second grievance of the Appellant, this Board deems it necessary to first establish whether there was ambiguity or not in both the tender document and the bid as submitted by the appellant company. The *ex admisissis* statement by the appellant company, whereby they stated “*That the failure by the appellant to quote a re-enforced elastomer bituminous emulsion water proofer was an oversight / clerical error.....*” is deemed as proof enough that the tender document was not ambiguous and neither was the bid by the appellant. This is being deemed as a clear error on the part of the appellant company. Being a Note 3 item, this Board is in agreement with the Evaluation Committee whereby a clarification request would not have solved the issue and / or saved the appellant’s bid. What was needed was a change in the technical offer, i.e. a rectification, something which is not possible due to the Note 3 restrictions. Hence, this Board does not uphold this grievance of the Appellant.

### **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 to Pullicin Developers Ltd,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Mr Lawrence Ancilleri**  
Member

**Dr Charles Cassar**  
Member