

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1689 – SPD1/2021/121 – Call for Tenders for the Supply and Installation of Fenders at the Esplora Foreshore Jetty**

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

The Board,

Having noted the letter of objection filed by Mr Noel Grech and Mr Ray Micallef acting for and on behalf of Sepoy Engineering Ltd, (hereinafter referred to as the appellant) filed on the 21<sup>st</sup> January 2022;

Having also noted the letter of reply filed by Mr Paul Mifsud on behalf of Malta Council for Science and Technology (hereinafter referred to as the Contracting Authority) filed on the 27<sup>th</sup> January 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 11<sup>th</sup> March 2022 hereunder-reproduced;

### **Minutes**

#### **Case 1689 – SPD1/2021/121 – Tender for the Supply and Installation of Fenders at the Esplora Foreshore Jetty**

The tender was issued on the 27<sup>th</sup> August 2021 and the closing date was the 24<sup>th</sup> September 2021. The value of the tender, excluding VAT, was € 20,000.

On the 21<sup>st</sup> January 2022 Sepoy Engineering Co Ltd filed an appeal against the Malta Council for Science and Technology as the Contracting Authority objecting to their disqualification on the grounds that their offer was not the cheapest.

A deposit of € 400 was paid.

There were five (5) bidders.

On the 8th 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 – Sepoy Engineering Co Ltd**

Mr Noel Grech  
Mr Ray Micallef

Representative  
Representative

## **Contracting Authority – Malta Council for Science and Technology**

Mr Paul Mifsud	Representative
Mr Mario Borg	Member Evaluation Committee
Ms Jaqueline Pace	Representative
Mr Joseph Degabriele	Representative
Ms Zoe Field	Representative

## **Preferred Bidder – LBV Malta Ltd**

Dr Tiffany Attard	Legal Representative
Mr Justin Attard	Representative

## **Department of Contracts**

Dr Mark Anthony Debono	Legal 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.

Mr Ray Micallef Representative for Sepoy Engineering Co Ltd said that the original Bill of Quantities (BOQ) stipulated three marine fenders and the tender requested three fenders. The way the tender is worded it indicated that nine fenders were required. Nowhere in the tender is the unit rate mentioned. The contracting Authority corrected the bidder's submission but this was not agreed with. There is divergence between the unit rate and the wording in the tender.

Mr Paul Mifsud Representative for the Malta Council for Science and Technology said that the Evaluation Committee realised that the same figure was used for the unit rate and the overall cost. The matter was referred to the Director of Contracts who advised that the unit rate prevails.

Mr Mario Borg a member of the Evaluation Committee confirmed that the Committee had relied on the advice of the Director of Contracts to ensure that they acted correctly.

There being no further submissions the Chairman thanked the parties and declared the hearing concluded.

End of Minutes

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**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 Sepoy Engineering Ltd (hereinafter referred to as the Appellant) on 21<sup>st</sup> January 2022, refers to the claims made by the same Appellant with regards to the tender of reference SPD1/2021/121 listed as case No. 1689 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Mr Noel Grech and Mr Ray Micallef

Appearing for the Contracting Authority: Mr Paul Mifsud

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

- a) *“Our total Bid excluding VAT was for 16,200 Euro. This is the lowest bid of all the three bids that were submitted.*

*The Tender Evaluation Committee informed us that the unit price in the Financial Bid Form submitted with our offer was incorrectly filled in. I have replied to this information sent by the Committee and explained as follows:*

*The description on the Financial Bid Form describes the project as one complete project, as a matter of fact, it stipulates for the 'Supply and Installation of three (3) marine Fenders, 2m x1m, including the relevant metal structure, fixing and anchorage'. On the other hand the column 'QTY' is described as 3, when this should have been described as 1. Otherwise the tender would mean that 9 fenders are to be installed.*

*I humbly ask that the decision should be revisited as I believe this was not an error.*

*I conclude that we, as Sepoy Engineering Ltd., still confirm that the complete project of supplying and installing the three fenders as described in the tender documents can be done with the grand total price bid that we submitted, that is, 16,200 Euro excluding VAT.”*

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 27<sup>th</sup> January 2022 and its verbal submission during the virtual hearing held on 8<sup>th</sup> March 2022, in that:

- a) This was an open call for the supply and Installation of three (3) fenders. Three (3) bidders placed their offer.
- b) At evaluation it was noted that the cheapest bidder, namely the appellant Messrs Sepoy Engineering Co. Ltd, had erroneously filled-in the Financial Bid Form. The appellant filled-in the same amount

in the unit price and the total price for the three (3) fenders. This was clearly an error that required correction.

- c) MCST invoked Article 17.1 (b) of the General Rules Governing Tenders v4.3 which states that *“where there is a discrepancy between a unit price and the total amount derived from the multiplication of the unit price and the quantity, the unit price as quoted will prevail”*
- d) Furthermore, MCST took the advice of SPD, which in turn took the advice of the Contracts Department on this matter through the Permanent Secretariat.
- e) Following advice of the Department of Contracts, MCST made the arithmetical correction dictated by the procurement regulations, that is, corrected the bid by multiplying the unit price submitted by the number of fenders. The correction was sent to the economic operator, explaining the reason for this correction and asking the economic operator to accept the correction.
- f) The economic operator did not accept the correction, and instead opted to adjust the unit price, a move that is not allowed by the procurement regulations since the financial bid form is a note 3 criteria and therefore cannot be rectified.
- g) Hence, the TEC proceeded to apply Article 17.1 and award the tender to the cheapest offer after the necessary corrections were made in ePPS.
- h) All relevant documentation related to this episode was uploaded in ePPS within the restricted area.

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) To analyse this specific grievance, reference first needs to be made to the Tender Dossier Section 1 paragraph 5(D)(ii) whereby *“In case of any discrepancy between the information provided in the Financial Bid Form and the grand total in the tender response format (xml tender structure), the latter shall prevail. **This condition shall not apply to the financial bid forms constituting a Bill of Quantity (BOQ) or Financial Bid Form where the total can be arithmetically worked out and corrected as necessary and where applicable.**”* (bold & underline emphasis added)
- b) Hence, due to the fact that prospective bidders were required to present a “Bill of Quantities” (BOQ), as part of their submissions, this Board opines that the initial part (not highlighted in bold & underline above) does not apply in this particular case. The latter part, highlighted in bold & underline, is however very much relevant to the case in point as the discrepancy can easily be worked out and if need be corrected.
- c) In this regard, the Contracting Authority correctly communicated with the Appellant to correct as necessary the “total column”. The prospective bidder, now appellant rejected such proposed amendment and insisted on amending the “unit price”. This is something which is not permitted under the General Rules Governing Tenders, whereby in paragraph 17.1.b *“Admissible tenders will be checked for arithmetical errors by the Evaluation Committee. Without prejudice to other arithmetical errors which*

*may be identified, the following errors will be corrected as follows: where there is a discrepancy between a unit price and the total amount derived from the multiplication of the unit price and the quantity, the unit price as quoted will prevail*". This Board opines that the General Rules Governing Tenders are very clear whereby in such circumstances, it is the "Unit Price" which shall prevail.

Therefore this Board does not uphold Appellant's grievances.

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

**Mr Kenneth Swain**  
Chairman

**Dr Charles Cassar**  
Member

**Mr Lawrence Ancilleri**  
Member