

PUBLIC CONTRACTS REVIEW BOARD

Case 1707 – SPD7/2021/083 – Tender for the Mechanical and Engineering and Finishing Works at the Lija servizz.gov Hub using Environmentally Friendly Products and Materials

25th April 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 4th February 2022;

Having also noted the letter of reply filed by Dr Alexia J Farrugia Zrinzo, Dr Leon Camilleri and Dr Kristina Busuttill acting for and on behalf of Servizz.gov Agency (hereinafter referred to as the Contracting Authority) filed on the 15th February 2022;

Having heard and evaluated the testimony of the witness Mr Dillon Zammit (Chairperson of the Evaluation Committee) as summoned by Dr Jonathan Thompson acting for FES Projects Ltd;

Having heard and evaluated the testimony of the witness Mr Henry Cipriott (Subcontractor to FES Projects Ltd) as summoned by Dr Alexia J Farrugia Zrinzo acting for Servizz.gov Agency;

Having heard and evaluated the testimony of the witness Engineer Anton Cutajar (Consultant to the Contracting Authority) as summoned by Dr Alexia J Farrugia Zrinzo acting for Servizz.gov Agency;

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 14th April 2022 hereunder-reproduced.

Minutes

Case 1707 – SPD7/2021/083 – Tender for the Mechanical & Engineering and Finishing Works at the Lija Servizz.Gov Hub using Environmentally Friendly Products and Materials

The tender was issued on the 31st October 2021 and the closing date was the 3rd December 2021. The value of the tender, excluding VAT, was € 222,851.43

On the 4th February 2022 FES Projects Ltd filed an appeal against servizz.gov Agency as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed not to be technically compliant.

A deposit of € 1,114.26 was paid.

There were two (2) bidders.

On the 14th April 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman Dr Charles Cassar 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 – FES Projects Ltd

Dr Jonathan Thompson	Legal Representative
Dr Marlon Borg	Legal Representative
Ms Laura Harron	Representative

Contracting Authority – servizz.gov Agency

Dr Alexia Farrugia Zrinzo	Legal Representative
Mr Henry Cipriott	Chairperson Evaluation Committee
Ms Abigail Abela Cavallaro	Secretary Evaluation Committee
Eng Justin Debono	Representative

Preferred Bidder – Camray Company Ltd

Dr Reuben Farrugia	Legal Representative
Mr Adrian Fabri	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 Jonathan Thompson Legal Representative for FES Projects Ltd said that Appellant's exclusion on technical non-compliance was due to missing or unclear literature although no clarification had been sought by the Contracting Authority. He then requested the testimony of witnesses.

Mr Dillon Zammit (135487M) called as a witness by Appellant testified on oath that he runs a company specialising in water and electrical installations and was subcontracted by Appellants and involved in this tender. He testified that the surge protectors offered by Appellants were not three types but of modular form which covered all types of uses. The flow pump offered in the bid well exceeds the tender requirements and its use is intended to pump water downwards not upwards.

Questioned by Dr Farruga Zrinzo, Legal Representative for servizz.gov Agency witness said that the surge protector has the same use dependent on whether it is used in single phase or three phase supplies.

In reply to a question from Dr Reuben Farrugia Legal Representative for Camray Company Ltd witness stated that the pump specifications have been met but noted that the pressure varies.

Mr Henry Cipriott (2683M) called as a witness by the Contracting Authority testified on oath that he is the Head of Corporate Services and was the Chairperson of the Evaluation Committee. He stated that the Appellant failed to submit literature on certain items – a letter of clarification was sent and replied to in time. On the surge protector the requested details as to the type to be provided had still not been submitted. As regard the water heater the literature list was not part of the rectification letter whereas the light fitting literature was requested in the rectification but still Appellant failed to submit. The document submitted on the extractor fan was almost illegible and showed five models without any indication which model was being offered. Besides this document was in the Italian language with no translation offered – totally contrary to the terms of the tender. The Engineer on the Evaluation Committee indicated that the flow pump offered did not meet the tender requirements.

Questioned by Dr Thompson witness confirmed that the literature submitted on the extractor fan was almost illegible, whilst in reply to a question from Dr Farrugia witness stated that five models of the extractor fans were illustrated but there was no indication which model was being offered – this apart from the literature being in Italian.

Engineer Anton Cutajar (272755M) called as a witness by the Contracting Authority testified on oath that he was a an Engineer and Consultant to many companies. He prepared the tender specifications. He confirmed that the pump offered did not meet the requirements regarding the flow. He re-iterated this in reply to a question from Dr Farrugia.

This was the end of the testimonies.

Dr Thompson said that the various reasons given for the exclusion have to be justified. It was incorrectly claimed by the Authority that three types of surge protector were offered when it fact it was one type having three different uses. The Authority also accepts that no rectification was sought on the water heater when this came under Note 2. Witness Mr Zammit indicated that the pump's specifications meet the requirements of the tender. Proportionality should have been applied and discretion exercised.

Dr Reuben Farrugia stated that the literature displayed on screen indicated three different specifications for the surge protector. There was no indication that witness Mr Zammit was qualified and the argument that a single phase protector is different to a three phase one is fallacious. He also confirmed that the water pump did not conform. This contrasted with the very learned view of Engineer Cutajar. Five models of the extractor fan were offered with no indication as to which model was being proposed. Appellant was not correct in claiming that further rectification should have been sought. PCRB Case on the 6th October 2021 supports this principle.

Dr Alexia Farrugia Zrinzo said that the Appellant did not avail itself of the clarification issued. It was confirmed by Mr Zammit that the three surge protectors offered gave different outputs with no indication that they met the tender requirements. The same could be said of the water heater. The rectification request on the light fittings was ignored whilst failure to reply to a clarification was sufficient to disqualify an economic operator. The points made by witness on the extractor fan and the flow pump were all valid ones. The Court of Appeal quoting a sentence of the European Court had emphasised the need to observe the tender specifications religiously. Attempts to extend the principle of proportionality cannot make up for the shortcomings of an economic operator. The financial evaluation does not come into it as Appellant had not reached that stage in the evaluation process.

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 14th April 2022.

Having noted the objection filed by FES Projects Ltd (hereinafter referred to as the Appellant) on 4th February 2022, refers to the claims made by the same Appellant with regard to the tender of reference SDP7/2021/083 listed as case No. 1707 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 Alexia J Farrugia Zrinzo
Appearing for the Preferred Bidder:	Dr Reuben Farrugia

Whereby, the Appellant contends that:

- a) First Grievance - The Contracting Authority states that in the rectification submitted by FES on the 19th December 2021, following a request by the Contracting Authority “the following literature was not submitted”
 - i. “Surge Protector” - This is incorrect. This is in fact submitted in page 84 and page 85 of the rectification submitted by FES on the 19.12.2021.
 - ii. “Water heater” - This is incorrect. The Contracting Authority never requested FES for any rectification with regards to the water heater as may be clearly seen in the request for

clarification. Furthermore, the tender document only required that the storage water heater would satisfy certain technical specifications (i.e. heating capacity of 3kw, heater to be equipped with a power indicator, anti-scald system and a manual reset thermal cut). Such specifications are quite standard in today's world and it is practically impossible to supply water heaters not satisfying such specifications.

- iii. "Light Fitting type F", "CAT6 cable" and "AC Indoor and Outdoor Units for the SKW AC" - Following receipt of the letter of disqualification and upon further investigation by the Appellant, it results that this information may have not been attached to the initial submission. Nevertheless, as shall be submitted hereunder, the Contracting Authority could have easily requested a clarification or rectification for such a minor matter which would have allowed the appellant's bid to be evaluated further, thus ensuring the fairness of the present competitive process as well as maximum participation. For all intents and purposes, literature concerning these items is being enclosed herewith.
- b) Second Grievance - The Contracting Authority further states that *"the literature provided for the supply or extract fan was almost illegible and no markings were visible that specify what fans will be provided"*. This reason for disqualification is absurd. The literature provided is not illegible as one may clearly see in page 130 of the response for rectification provided. Furthermore, since only one type of fan was provided there was never the need for marking any items.
- c) Third Grievance - The Contracting Authority further states that *"the literature submitted for the flow pump was not according to requested specifications i.e. 25 Hm (2.5bar)." This reason for disqualification is similarly absurd. The item provided is in fact superior to the item requested, insofar as the flow pump submitted can go 13 metres higher than the one requested.*

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 15th February 2022 and its verbal submission during the virtual hearing held on 14th April 2022, in that:

- a) First Grievance –
 - i. Surge Protector - servizz.gov hereby submit that the objector did include literature regarding Surge Protectors, in pages 84 and 85 of the rectification submitted, however the literature submitted comprises of 3 different types of surge protectors and the objector failed to indicate which type will be provided in relation to the tender in question. Therefore, did not properly address the omission of literature the objector was asked to rectify.
 - ii. Water Heater - In relation to water heater literature, servizz.gov and DOC submit that although this has not been indicated in the request for rectification, literature in this regard was requested in the original Literature List uploaded on the ePPS and the objector failed to present it. The submission that 'such specifications are quite standard in today's world and it is practically impossible to supply water heaters not satisfying such specifications' is

irrelevant and out of context, since this Honourable Tribunal is well aware that in procurement procedures, what is required shall be clearly requested and the bidder shall clearly prove that all technical specifications are met.

- iii. Light Fitting type F, Cat6 cable and indoor and Outdoor Units for the 5KW AC - servizz.gov and DOC hereby submit that this part of the first 'grievance' of the objector is a crystal-clear admission of its shortcomings, when stating that 'following further investigations by the appellant, it resulted that this information may have not been attached to the initial submission'. In fact, literature on the items in question was not submitted with the initial tender submission and the objector was in fact given the opportunity to present these documents by means of a rectification, yet again failed to do so. The objectors failed to make good use of this chance and whilst presenting numerous documents in relation to the request they still failed to submit the required literature in relation to the Light Fitting type F, Cat6 cable and indoor and outdoor Units for the 5KW AC. Rather than availing of the opportunity provided to rectify the shortcomings, the objector failed to present the requested documentation and is in turn expecting that the contracting authority makes a further request for rectification on the basis of preceding request for rectification. The contracting authority is not obliged to and could not issue a second request for rectification on the same shortcoming. Furthermore, the rectification letter clearly stipulated that: *"In terms of Article 5 of the Instructions to Tenderers, you are hereby being given the opportunity to rectify these shortcomings within five (5) working days of notification, i.e. by Monday 20th December. Tenderers who fail to rectify the shortcomings identified in this communication shall be deemed to be non-compliant."* servizz.gov and DOC humbly submit that when the contracting authority asked the objector for literature, said was not presented despite the clear request, and therefore in accordance with the general principles of procurement legislation, the objector was considered as non-compliant.
- iv. Second Grievance - servizz.gov and DOC humbly submit that as is clearly evident from literature supplied for extract fans is almost illegible. This reason is factual and certainly far from absurd. servizz.gov and DOC indicated that the literature in this regard was almost illegible since although the numbers can 'with a certain level of difficulty' be deciphered, most words in small fonts are certainly illegible. In addition, it appears that the document provided includes four types of fans and not just one type of fan as stated by the objector, and the objector failed to clearly indicate which model would be used for each specific fan in the tender. Furthermore to the above, from the words in larger fonts, it appears that this unclear documentation may be in Italian, something which although permitted in the tender, should have been accompanied by an accurate English translation as clearly indicated in the first paragraph of the 'Literature List' which states: *"Supporting documents and printed manufacturer's technical literature furnished by the tenderer may be in another*

language, provided they are accompanied by an accurate translation into English. For the purposes of interpretation of the tender, the English language will prevail.” It is therefore being submitted that in addition to sending an illegible document the objector also failed to send a legible translation to the English language.

- b) Third Grievance - In this part of the objection, the objector is alleging that this reason for disqualification is absurd because he submitted a superior product. servizz.gov and DOC submit that this is fundamentally incorrect since the item provided is certainly not considered higher than what was specified. Technically, as will be further explained during the hearing, it is being submitted that the specification in the tender called for the flow pump is as follows: 0.451/s @2.5 bar. This translates to 0.451/s @25Hm. The item submitted by the contractor includes a graph which depicts clearly that at the required flow rate of 0.451/s, the resulting head would be 7Hm at 50Hz and 15Hm at 60Hz. This means that the product required is different than that offered. Furthermore, from a legal point of view it is being submitted that if the tender document provides for a measurement, this ought to be respected in the offers and if the objector feels that such condition or specification is restraining, or limits competition, the adequate procedure in terms of regulation 262 of the Public Procurement Regulations may be followed.

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 witnesses duly summoned, will consider Appellant’s grievances as follows:

- a) First grievance –
- i. Surge Protector – The Board notes that the Contracting Authority confirmed that such technical literature was in fact submitted. From the document submitted and testimony under oath of Mr Dillon Zammit it remains unclear which ‘model’ of surge protector was being offered. The reasoning provided by Mr Zammit that the product offered is ‘modular’, would still require the prospective bidder to submit / confirm how this product will be offered. This, in order for the Evaluation Committee to properly evaluate its technical compliance. Therefore, this Board does not uphold Appellant’s argumentation in reference to the ‘Surge Protector’.
 - ii. Water heater – This Board opines that both parties did not meet what was required of them. Initially the Appellant did not submit technical literature documentation in reference to this requirement. Being a ‘Note 2’ item, the Contracting Authority also erred when it failed to request a rectification from the Appellant. Following the principle of proportionality, a Contracting Authority should try and save a tender if it has the means afforded to it by the Tender Dossier. In this case, and in reference only to the water heater,

this did not occur. Hence, this Board will uphold this part of the first grievance of the Appellant.

- iii. Light Fitting type F, Cat6 cable and indoor and Outdoor Units for the 5KW AC – This Board notes that the Appellant did not initially submit requested technical literature documentation. For these items, the Contracting Authority did make a request for rectification, therefore it availed itself of the tools provided to it and under its disposal to try and ‘save’ the tender. The Appellant, again, did not provide requested documentation. Therefore, this Board does not uphold this part of Appellant’s first grievance.
- b) Second grievance – Following proof presented to this Board, it transpires that the technical literature document submitted was indeed legible. However, this document was in the Italian language and no translation into the English language was provided by the Appellant as requested by the Tender Dossier. Moreover, said document lists five (5) types of different models having different specifications, dimensions and prices. The appellant did not mark which model was being offered in his bid. Therefore, this Board does not uphold Appellant’s second grievance.
- c) Third Grievance – Reference is being made to the testimony under oath of Engineer Anton Cutajar who categorically explained how the pump offer did not meet the requirement regarding the flow required in the tender dossier. Reference is also made to the testimony under oath of Mr Dillon Zammit who, when questioned by Dr Reuben Farrugia, also confirmed that the pump on offer has some ‘differences’ to what was requested in the tender dossier. Therefore, this Board cannot but reject 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,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Richard Matrenza
Member