

PUBLIC CONTRACTS REVIEW BOARD

Case 1709 – SPD3/2021/069 – Framework Agreement for the Supply and Delivery of Road Marking Paint for the Ministry for Gozo General Stores

28th April 2022

The Board,

Having noted the letter of objection filed by Mr Adam Grima acting for and on behalf of B. Grima & Sons Ltd, (hereinafter referred to as the appellant) filed on the 3rd March 2022;

Having also noted the letter of reply filed by Mr Reno Micallef acting for the Ministry for Gozo (hereinafter referred to as the Contracting Authority) filed on the 14th March 2022;

Having heard and evaluated the testimony of the witnesses Mr Adam Grima (Representative of B. Grima & Sons Ltd) as summoned by Dr Tonio Cachia acting for B. Grima & Sons Ltd;

Having heard and evaluated the testimony of the witnesses Mr Reno Micallef (Chairperson of the Evaluation Committee) as summoned by Dr Anthony Borg acting for the Ministry for Gozo;

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 26th April 2022 hereunder-reproduced.

Minutes

Case 1709 – SPD3/2021/069 – Framework Agreement for the Supply and Delivery of Road Marking Paint for the Ministry for Gozo's General Stores

The tender was issued on the 15th November 2021 and the closing date was the 6th December 2021. The value of the tender, excluding VAT, was € 73,900

On the 3rd March 2022 B.Grima & Sons Ltd filed an appeal against the Ministry for Gozo as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed not to be technically compliant.

A deposit of € 400 was paid.

There were seven (7) bidders.

On the 26th April 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 – B.Grima & Sons Ltd

Dr Tonio Cachia	Legal Representative
Mr Adam Grima	Representative

Contracting Authority – Ministry for Gozo

Dr Anthony Borg	Legal Representative
Mr Reno Micallef	Chairperson Evaluation Committee
Ms Liliana Curmi	Secretary Evaluation Committee
Mr Marnol Sultana	Representative

Preferred Bidder – Koperattiva Tabelli u Sinjali tat-Traffiku

Mr Louis Zammit	Representative
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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.

Dr Tonio Cachia Legal Representative for B Grima & Sons Ltd said that the appeal was based on the grade of skid resistance of the paint offered in the bid. The technical literature submitted did not indicate the grade of resistance but since this came under Note 2 clarification should have been sought. This was a case of a genuine mistake and a clarification would have resolved this query.

Dr Anthony Borg Legal Representative for the Ministry for Gozo said that the point of the disqualification is that appellant offered S1 standard when the tender required S2 – both the literature and the technical offer indicated the wrong product and a clarification in this matter would have been tantamount to accepting a fresh offer - hence the seeking of a clarification did not arise.

Mr Adam Grima (115080M) called as a witness by the Appellant testified on oath that the S1 product indicated in the offer was an error – if clarification had been sought this would have been easily corrected through presentation of the correct certificate. In the submissions made there was no reference to either S1 or S2 products - it simply stated 'skid resistance'.

Mr Reno Micallef (26088G) called as a witness by the Contracting Authority testified on oath that he was the Chairperson of the Evaluation Committee. He stated that the technical offer

form and the literature submitted indicated that both the white and the yellow paint was S1 standard. The Standards Tables indicated that S1 did not meet the specifications requested in the tender.

Questioned by Dr Cachia witness stated that the technical form was very clear that the product offered was S1; this apart from the fact that the literature failed to indicate the grade of resistance. The technical offer form was subject to Note 3 restrictions.

This concluded the testimonies.

Dr Cachia stated that point at issue was that the literature seemed to be ignored and the Evaluators were too rigid to stick to the technical offer – since skid resistance in the literature was not indicated it was a clear case of seeking clarification.

Dr Borg said that it was clear that S1 had been offered immaterial of what the literature stated. The Evaluation Committee acted correctly and had it sought clarification this would have equated to them stating that they were expecting a different offer.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 26th April 2022.

Having noted the objection filed by B. Grima & Sons Ltd (hereinafter referred to as the Appellant) on 3rd March 2022, refers to the claims made by the same Appellant with regard to the tender of reference SPD3/2021/069 listed as case No. 1709 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Tonio Cachia

Appearing for the Contracting Authority: Dr Anthony Borg

Whereby, the Appellant contends that:

- a) Rejection Letter stated: *“Technically Non-Compliant since the technical offer did not meet the technical specifications. The skid resistance minimum value of paint containing pre-mix glass bead was ≥ 45 and not ≥ 50 .”*
- b) BGS' technical offer and technical literature, which had to be submitted together for each specific product in the tender do not state that the 'paint containing pre-mix glass bead was ≥ 45 ' as stated in the letter of the 2 February 2022;
- c) The relevant parts of the technical offer are listed as 'Item 7' (yellow) and 'Item 8' (white) referring to 'paint containing pre-mix glass beads'. In both cases in page 3 and page 4 of the technical offer the skid resistance is marked 'S1'. Meanwhile in the technical literature (page 12 - White Acrylic Semi-Reflective Paint) the skid resistance is referred to 'High Skid Resistance';
- d) Therefore, the technical offer and literature are not stating that this specific type of paint is or is not ≥ 45 . In view of this lack of clarity which is the result of a mistake by BGS in its submissions the adjudicating committee was legally obliged to request a clarification on this specific point from BGS.
- e) In terms of Part 5C of the tender dossier, the technical offer is marked as 'Note 3', thus the adjudicating committee was obliged to request a clarification from BGS, which would have also granted the opportunity to BGS to amend/update its technical literature which is marked as 'Note 2' in the tender, thus could have been rectified to remove any doubts. Rectification permits BGS to replace completely the technical literature in question even with another product to make sure that it complies with the requested tender requirements.
- f) In view of the adjudicating committee's failure to resort to this request to BGS, its decision is defective and must be annulled by this board, thus reinstating BGS in the process and resuming the adjudicating process with a request for clarification from BGS.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 14th March 2022 and its verbal submission during the virtual hearing held on 26th April 2022, in that:

- a) The Adjudicating Committee duly evaluated the bid submitted by the complainant and concluded that this bid was technically non-compliant since the information listed in the technical offer form (Note 3) were (sic) not as per specifications requested in the Tender document (refer to section 3 in the Tender document) (Annex 1).
- b) Clause 3 of Section 3 – Technical Specifications (page 13 of the Tender document) requested that: *“paint containing pre-mix glass beads should have a Skid Resistance Minimum Value of ≥ 50 .”*
- c) On the other hand, in the technical offer form, the complainant listed: *“a skid resistance value of 'S1' for both yellow and white road marking paint containing premix glass beads.”*
- d) In view of this technical discrepancy, the Adjudicating Committee also consulted the European Standard for Road Markings (EN1435) (Annex 2). The requirements in such standards were also quoted in the Tender document as a mandatory requirement.

- e) Specifically, the said EN1436 stated that an:
 - i. SRT Value of ≥ 45 is equivalent to Class S1
 - ii. SRT Value of ≥ 50 is equivalent to Class S2
- f) In view of this, the Adjudicating Committee considered the 'S1' value listed by the complainant as an RT value of ≥ 45 , thus automatically rendering the bid technically non-compliant. Indeed, the complainant is admitting such omission in paragraph 2 (ii) of the objection letter. As also stated by the complainant, clause 2 (iv) in the letter of objection, the Technical Offer Form is marked by 'Note 3', whereby: *"No rectifications shall be allowed. Only clarifications on the submitted information may be requested."*
- g) Considering this, it was therefore impossible for the Adjudicating Committee to accept any rectification on the submitted value 'S1'. Moreover, the board did not require any further clarifications since it was very clear what the bidder is proposing and consequently very clear that the items listed by the complainant did not meet the specifications requested in the Tender document.
- h) With reference to the complainant's claim that:

"the adjudicating committee was obliged to request a clarification from BGS, which would have also granted the opportunity to BGS to amend/update its technical literature which is marked as Note 2....."

Requesting a clarification on the technical literature would have been futile since the offer/information submitted by the complainant in the Technical Offer Form was clear and which constituted the offer as technically non-compliant. In line to article 16.3 of the general Rules governing tendering, the Adjudicating Board acted proportionally and strictly within the limits of the principle of self-limitation once the complainant's technical offer (marked as Note 3) was unambiguous and needed no further clarification.

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) This Board notes that it is not being contested that in the Technical Offer form (which falls under Note 3), the Appellant listed as 'S1' for Skid Resistance in Item 7, being 'Yellow Road Marking Paint containing pre-mix glass beads', and Item 8, being 'White Road Marking Paint containing pre-mix glass beads'.
- b) The tender dossier required an SRT Skid Resistance value of ≥ 50 .
- c) As per EN1436 – European Standard for Road Markings an SRT Skid Resistance value of ≥ 50 is equivalent to S2.

- d) As per Public Contracts Review Board (“PCRB”) decision 1590, it was stated *“The Board, fully acknowledges the fact that this is most probably a human typing mistake. However, the Board also notes that the ‘Technical Offer’ falls within Note 3, i.e. no rectifications allowed, and in this case it should take precedence due to the conflicts also found within the ‘Technical Literature’ submission”*This Board opines that PCRB case 1590 is relevant to the case in hand since the facts of the case are very similar to one-another.
- e) In this case, the technical literature for items 7 and 8 stated “High skid resistance”, indicating no specific SRT value. The technical offer form, for skid resistance, listed ‘S1’.
- f) This Board opines that it would have been futile for the Evaluation Committee to proceed with a clarification / rectification request on the technical literature, to ascertain what actual SRT value the product listed ‘High skid resistance’ contains, once the Technical Offer form listed ‘S1’, which is a value below the requirements of the tender dossier.
- g) Hence, in the opinion of this Board, the Evaluation Committee correctly deemed the Appellant’s bid as technically non-compliant.

Hence, this Board does not uphold the Appellant’s grievance.

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 Koperattiva Tabelli u Sinjali tat-Traffiku,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Dr Charles Cassar
Member