

PUBLIC CONTRACTS REVIEW BOARD

Case 1732 – SPD1/2022/035 – Works – Tender for the Supply and Installation of Synthetic Turf and Ancillary Works at Giovanni Curmi Higher Secondary School Naxxar

30th May 2022

The Board,

Having noted the letter of objection filed by Dr Ryan Bezzina acting for and on behalf of Mr George Vella, (hereinafter referred to as the appellant) filed on the 5th May 2022;

Having also noted the letter of reply filed by Dr Matthew Paris on behalf of Dalli Paris Advocates acting for Foundation for Tomorrow's Schools (hereinafter referred to as the Contracting Authority) filed on the 10th May 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 25th May 2022 hereunder-reproduced.

Minutes

Case 1732 – SPD1/2022/035 – Tender for the Supply and Installation of Synthetic Turf and Ancillary Works at Giovanni Curmi Higher Secondary School Naxxar

The tender was issued on the 16th February 2022 and the closing date was the 3rd March 2022. The value of the tender, excluding VAT, was € 48,270.

On the 5th May 2022 Mr George Vella filed an appeal against the Foundation for Tomorrow's Schools as the Contracting Authority objecting to his disqualification on the grounds that his bid was deemed to be not technically compliant.

A deposit of € 400 was paid.

There were two (2) bids.

On the 25th May 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Mr George Vella

Dr Ryan Bezzina

Legal Representative

Contracting Authority – Foundation for Tomorrow’s Schools

Dr Matthew Paris	Legal Representative
Ms Amanda Cassar	Representative
Mr Franco Costa	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 Ryan Bezzina Legal Representative for Mr George Vella said that it was not contested that the technical form was submitted but it is claimed that certain parts of it were not properly filled out. This was a case where equal treatment and transparency needed to be practiced if it was a case of erroneous or incomplete information in line with Public Procurement Regulations 39 and 62(2). Reference was made to CJEU cases dealing with the obligation of the Contracting Authority to seek corrections to supplement information given. Reference was also made to PCRB Cases 772 and 596 particularly the latter case which dealt with the principle of substance over form. The claim by the Authority that they had to exercise self-limitation does not conflict with this said principle as in Case 1222 the Board held that proportionality allows an even and equitable decision.

Dr Matthew Paris Legal Representative for the Foundation for Tomorrow’s Schools said that that whilst one agrees with the Public Procurement principles the fact remains that the technical offer form lacked certain details – in fact four points were not filled in. The technical form comes under Note 3 which prohibits any changes and binds the Authority from seeking any such changes to the submissions. The law was correctly followed as failure to complete the technical form leads to automatic disqualification. The point made that the Appellant’s bid was cheaper does not alter the facts of the case. The principle of substance over form does not apply here as the literature submitted did not provide all the missing details.

Dr Bezzina pointed out that the appeal should be considered on the basis of the letter of objection i.e. the failure to fill in certain details.

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 25th May 2022.

Having noted the objection filed by Mr George Vella (hereinafter referred to as the Appellant) on 5th May 2022, refers to the claims made by the same Appellant with regard to the tender of reference SPD1/2022/035 listed as case No. 1732 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Ryan Bezzina

Appearing for the Contracting Authority: Dr Matthew Paris

Whereby, the Appellant contends that:

- a) There appears to be no contestation that the Technical Offer Form (Note 3) had been duly submitted as part of the bid documents to the Tender, as results from the electronic submission of the Appellant to the Tender. The Appellant rejects the conclusion, reached within the Decision that it has failed to submit a filled-in Technical Offer Form (Note 3). The Appellant humbly submits that the Technical Offer Form (Note 3) had in actual-fact been duly filled out and submitted as part of the Appellant's bid to the Tender. The SPD has, in its Decision, failed to provide any just explanation or reasons to show which parts of the Technical Offer Form (Note 3) have not been allegedly filled-in by the Appellant.
- b) Furthermore, in order to avoid any doubt as to whether any documentation or technical specifications have remained outstanding, the Appellant makes reference to the document entitled "Literature to be submitted with Technical Offer (Note 2) " submitted as part of the Tender documentation, which lists all the relevant, technical specifications that were required or requested in connection with the Tender. The Appellant contends that even if - for the sake of argument - the Technical Offer Form (Note 3) was not completed, which point is being contested by the Appellant- all requested technical information and specifications were duly provided by the Appellant.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 10th May 2022 and its verbal submission during the virtual hearing held on 25th May 2022, in that:

- a) Technical offer form not completed - Factually it is undisputed that the technical offer form was submitted by the appellant George Vella [as indicated in provision 10], it is however totally disputed

that the technical offer form was submitted as completed; The appellant's technical offer had the following fields remaining void: i) Pile Length ii) Reaction to Fire iii) Compliance iv) Warranty. The literature submitted by the appellant, clearly fails to indicate the requisites of item 2.06.

- b) No changes permitted - Technical forms cannot and should not be changed in any manner after the tender submission deadline, not only since they are of NOTE 3 status, but also it would amount to a change in the original bid.
- c) Doctrine of self-limitation - The doctrine of self-limitation is an important public procurement principle which has been referred to by this honourable Board on various occasions, which seeks to ensure that tenderers are adjudged only on the basis of conditions stipulated within the tender document, this will ensure predictability and transparency.

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 notes that the facts of the case are not disputed.
- b) Many principles of public procurement have been recited by both parties, including those relating to equal treatment, proportionality, self-limitation, non-discrimination etc.
- c) This Board opines that the main issue at hand relates to missing information which was supposed to be included within the Technical Offer Form, which is a document which falls under the remit of Note 3.
- d) Therefore, was this missing information something which could be clarified? Was it a clerical error on the part of the Appellant?
- e) This Board opines that such missing information in the Technical Offer Form should be 'corrected' with a 'Rectification' and not a 'Clarification'. However, Note 3 is very clear in that "*No rectification shall be allowed.*" Therefore, the Evaluation Committee was precluded from requesting such a rectification from the economic operator.
- f) The Technical Offer Form also states within it that "*Failure to fill-in the mandatory technical offer column will result in disqualification.*"
- g) The fact that 4 items were left blank by the Appellant and not all information was present in the technical literature does not lead one to ascertain that this was a 'clerical error' on the part of the Appellant.

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

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Dr Vincent Micallef
Member