

PUBLIC CONTRACTS REVIEW BOARD

Case 1735 – SPD7/2021/086 – Supplies Tender for the Purchase of One (1) New Electric Vehicle for the Central Business District Foundation

30th May 2022

The Board,

Having noted the letter of objection filed by Mr Stephen Aquilina acting for and on behalf of Motors Inc, (hereinafter referred to as the appellant) filed on the 21st March 2022;

Having also noted the letter of reply filed by Mr Iman Schembri acting for The Central Business District Foundation (hereinafter referred to as the Contracting Authority) filed on the 23rd March 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 26th May 2022 hereunder-reproduced.

Minutes

Case 1735 – SPD7/2021/086 – Tender for the Purchase of One (1) Electric Vehicle for the Central Business District Foundation

The tender was issued on the 14th December 2021 and the closing date was the 25th January 2022. The value of the tender, excluding VAT, was € 32,000.

On the 21st March 2022 Motors Inc filed an appeal against the Central Business District Foundation as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be not technically compliant.

A deposit of € 400 was paid.

There were four (4) bids.

On the 26th May 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Vincent Micallef 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 – Motors Inc

Mr Stephen Aquilina

Representative

Mr Ryan Le Brun

Representative

Mr Johan Micallef Representative

Contracting Authority – St Vincent De Paul Long Term Care Facility

Mr Rodney Zahra Secretary Evaluation Committee

Mr Iman Schembri Representative

Preferred Bidder – Michael Attard Imports Ltd

Mr Tonio Fenech Representative

Mr Michael Attard 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.

Mr Ryan Le Brun Representative for Motors Inc said that all documents requested in the tender were uploaded. The Technical Offer had all the required boxes ticked; besides brochures and specifications had been supplied giving all the technical information on a bid that was cheaper than the awarded offer.

Mr Iman Schembri Representative for the Central Business District Foundation confirmed that one of the submitted files from Appellant, namely the Technical Offer Form, would not open. This was referred to the Department of Contracts and subsequently to Euro Dynamics which confirmed that the file was corrupted at source. Since this was a Note 3 item rectification was not possible.

The Chairman thanked the parties for their submission and declared the hearing closed.

End of Minutes

Hereby resolves:

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

Having noted the objection filed by Motors Inc (hereinafter referred to as the Appellant) on 21st March 2022, refers to the claims made by the same Appellant with regard to the tender of reference SPD7/2021/086 listed as case No. 1735 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Mr Ryan Le Brun

Appearing for the Contracting Authority:

Mr Iman Schembri

Whereby, the Appellant contends that:

- a) Our submission was the cheapest offer, by €326 against the one presented by the next bidder, which has been recommended for award.
- b) We have uploaded the tender as per the usual procedure and we were notified that the tender package has been uploaded successfully. Once the tender has been uploaded there is no way for us to check the uploaded files.
- c) We have asked our I.T. department to investigate the error that caused this. A log file in the tender package file was found in which a file copy error was found. Log file was compared to the corresponding file in a successful tender package. This was done with two successful tender packages, in both successful tender packages, the file error copy was not found. On this occasion, the tender tool tried to copy a file while it was being uploaded. A required file was open in another program (say Word, Acrobat Reader, Excel) while it needed to be packed.
- d) The tender was uploaded in three (3) parts consisting of the technical questionnaire, financial bid, and supporting literature (specification sheet and a sales brochure). We feel that it is unfair to be disqualified on the basis that the technical offer file was corrupted, as we have provided evidence that the model we proposed passes all the tender requirements.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 23rd March 2022 and its verbal submission during the virtual hearing held on 26th May 2022, in that:

- a) It is to be noted that while it is true that the appellant's offer was €326 cheaper than the next bid which was recommended for award, repeated attempts to open the technical offer part of the tender proved unsuccessful. In view of this, the corrupted file was then referred and escalated to European Dynamics (EPPS system operator) and their feedback was that the file was not openable.
- b) On this issue, reference is also made to the Court of Appeal decision Specialist Group vs CPSU (25/02/2021) where it was decided that a contracting authority cannot be held liable for not being able to access a file if this was corrupted at source.
- c) It is also pertinent to note that the Electronic Public Procurement Provisions, specifically Rule 9 of the General Rules Governing Tenders v4.4, the technical offer is subject to Note 3 and bidders cannot re-submit documentation.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will now consider Appellant's grievances.

- a) This Board notes:
 - i. that the Appellant is *ex admisissis* stating that the file was 'corrupted at source'. (reference to point (c) of Appellant's contentions).
 - ii. Even though no actual proof has been brought before this Board, either through the form of reports, emails or testimony, the Evaluation Committee is stating that communications have been done with European Dynamics (EPPS system operator) with confirmation that the file was corrupted at source.
- b) Reference is made to Specialist Group vs CPSU (25/02/2021) Court of Appeal No 320/2020/1 whereby *"Il-każ tallum huwa differenti mhux biss għax hemm prova illi l-files tassew kienu corrupted at source..... L-imġieba tal-oblatur f'dan il-każ ma kinitx dik ta' 'reasonably well-informed and normlly diligent tenderers'"*
- c) The fact that the Appellant's bid is Eur326 cheaper is deemed irrelevant at this stage as financial evaluation is performed only after economic bidders would have successfully gone through administrative and technical compliance.

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 Vincent Micallef
Member

Mr Richard Matrenza
Member