

PUBLIC CONTRACTS REVIEW BOARD

Case 1739 – SPB T/03/2021 – Tender for the Maintenance of an Elevated Balcony Walkway in the Locality of San Pawl il-Bahar

13th June 2022

The Board,

Having noted the letter of objection filed by Mr Justin Attard acting for and on behalf of LBV Ltd, (hereinafter referred to as the appellant) filed on the 25th April 2022;

Having also noted the letter of reply filed by Dr David Bonello acting for San Pawl il-Bahar Local Council (hereinafter referred to as the Contracting Authority) filed on the 5th 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 31st May 2022 hereunder-reproduced.

Minutes

Case 1739 – SPB T/03/2021 – Tender for the Maintenance of an Elevated Balcony Walkway in the Locality of San Pawl il-Bahar

The tender was issued on the 13th August 2021 and the closing date was the 24th September 2021. The value of the tender, excluding VAT, was € 248,900.

On the 25th April 2022 LBV Ltd filed an appeal against the San Pawl il-Bahar Local Council as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be not technically compliant.

A deposit of € 1244.50 was paid.

There were two (2) bids.

On the 31st May 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri 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 – LBV Ltd

Mr Justin Attard

Representative

Contracting Authority – San Pawl il-Bahar Local Council

Dr David Bonello	Legal Representative
Mr Daryl Connor	Chairperson Evaluation Committee
Mr Charlie Galea	Member Evaluation Committee
Ms Romina Perici Ferrante	Member Evaluation Committee
Ms Elke Sghendo	Representative
Architect Jeremy Mangion	Representative

Preferred Bidder – Andrew Vassallo General Trading Ltd

Dr Massimo Vella	Legal Representative Council
Mr Andrew Vassallo	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 Justin Attard Representative for LBV Ltd said that this appeal was in regard to missing documentation – two files were uploaded on the EPPS but there was an issue in opening these files. The literature lists were all submitted, whilst the Literature List Form comes under Note 2 and the Contracting Authority had an obligation to request clarification or rectification. There is jurisprudence backing this point.

Dr David Bonello Legal Representative for San Pawl il-Bahar Local Council said that a bidder is expected to check documents before uploading them – as it is there are blank documents on the EPPS and it stands to reason that rectification cannot be sought on a blank document, whilst rectification could not be sought on the technical offer as it falls under Note 3.

Dr Massimo Vella Legal Representative for Andrew Vassallo General Trading Ltd re-iterated that the technical offer comes under Note 3 and this point alone renders the appeal incorrect. It is clear that the problems lie with the Appellant. Reference was made to a Court of Appeal case where the facts concerned a corrupted file on the part of the bidder very similar to this case. The appeal cannot be entertained.

Dr Bonello said that it is clear that the technical offer comes within Note 3 whilst Dr Vella concluded by saying that the literature list was a separate matter but agreed that the technical offer came within Note 3.

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 31st May 2022.

Having noted the objection filed by LBV Ltd (hereinafter referred to as the Appellant) on 25th April 2022, refers to the claims made by the same Appellant with regard to the tender of reference SPB T/03/2021 listed as case No. 1739 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Mr Justin Attard
Appearing for the Contracting Authority:	Dr David Bonello
Appearing for the Preferred Bidder:	Dr Massimo Vella

Whereby, the Appellant contends that:

- a) Following verification of our tender submission, it was indeed confirmed that pdf files uploaded for Criterion I.1) Upload and clearly number items 1.1 and from 1.4 to 1.14 of the Literature List and Criterion I.2) Literature List Item 1.2 – Key Experts From (sic) and relevant Declarations, in line with Section E of the Technical Specifications, seemed to have inexplicable technical issues.
- b) From Literature List Form, which formed part of the tender documentation, it is clear that the submissions included in the same list are subject to the terms of "Note 2" of Clause 5 of Section 1 of the Tender Document. All the documents listed above were included in this list, except for the 'Tenderers Self Declaration'.
- c) Thus in terms of "Note 2" the Contracting Authority had an obligation to request a clarification or rectification in relation to the above criterion. Since "Note 2" states that "*tenderers will be requested*" this imposes an obligation on the Contracting Authority to request a clarification or rectification and it is not discretionary. After all such an obligation is in conformity with the jurisprudence on the matter.
- d) Additional reference is hereby also done to Criterion I.3) Literature Item 1.3 - Tenderers Self Declaration, as per form available to download from the Contract Document Section. This necessitated the submission of Declaration Form, or the 'Tenderers Self Declaration', which formed part of the tender documentation, and which contrary to the above referred tender documentation is subject to the terms of "Note 3" of Clause 5 of Section 1 of the Tender Document - non-rectifiable. However unlike what was concluded by the Evaluation Committee, this document was indeed submitted at tendering stage, and there seems to be no technical issues

with such file. This is easily verified through the e-PPS system. For record purposes, the file label is '1551359777151.pdf.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 5th May 2022 and its verbal submission during the virtual hearing held on 31st May 2022, in that:

- a) The reply to the objection will focus only on the Criterion 1. Upload and clearly number items 1.1 and form 1.4 to 1.14 of the Literature List Item 1.2 - Key Expert Form and relevant Declarations, in line with Section E of the Technical Specifications. The company's objection on this point seems to be that there inexplicable technical issues.
- b) The Council humbly submits that as submitted by the tenderer himself, these documents were not submitted and ultimately never arrived at the council or the evaluation committee for them to evaluate. The tenderer says that this is due to the fact that there was a technical error however the tenderer does not give any details of how and why this technical error happened and therefore no proof was put forward.
- c) The tenderer who put forward the objection must proof (sic) such technical error, if this really happened and moreover with the objection, he did not provide the documents in questions. The Council certainly cannot be at fault, even if it is proven that there in fact was a technical error. Regarding these points the Council could not ask for a clarification as per tender document and hence abided by the tender document.

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) The Board notes that the rejection letter issued by the Contracting Authority on 5th April 2022 issued to the Appellant, LBV Ltd, included 4 points / reasons for rejection, 2 of which fall under Note 3.
- b) *Ex admissis* from the Appellant, there was an issue with the software used to compress the files needed to be uploaded onto the ePPS.
- c) Appellant is aggrieved that the Contracting Authority did not make any request for clarifications, however this Board opines that the Evaluation Committee proceeded in the correct manner. This due to the fact that the Appellant's bid had missing documents which fell under Note 3 [specific reference to the *Technical Offer including work plan, health and safety plan and other related documents (mandatory)*], and therefore no rectifications are allowed.
- d) Reference is also 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-imgieba tal-oblatur f'dan il-każ ma kinitx dik ta' 'reasonably well-informed and*

normally diligent tenderers”. Therefore, in the opinion of this Board, the fact that the problem occurred at source, caused by the software utilised by the Appellant and specifically impacted documents which fall under the remit of Note3, is proof enough that the Evaluation Committee did not infringe any principles and / or policies of public procurement.

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

Mr Lawrence Ancilleri
Member

Dr Vincent Micallef
Member