

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1745 – XWM 67/01/22 – Works Tender for the Embellishment of Area Surrounding the Xarolla Mill, Zurrieq**

**20<sup>th</sup> June 2022**

The Board,

Having noted the letter of objection filed by Mr Justin Attard acting for and on behalf of LBV Limited, (hereinafter referred to as the appellant) filed on the 16<sup>th</sup> May 2022;

Having also noted the letter of reply filed by Dr Andre Borg on behalf of Borg & Associates Advocates acting for and on behalf of the Zurrieq Local Council (hereinafter referred to as the Contracting Authority) filed on the 26<sup>th</sup> 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 16<sup>th</sup> June 2022 hereunder-reproduced.

#### **Minutes**

#### **Case 1745 – XWM 67/01/2022 – Tender for the Embellishment of Area surrounding the Xarolla Mill.**

The tender was issued on the 10<sup>th</sup> December 2021 and the closing date was the 10<sup>th</sup> January 2022. The value of the tender, excluding VAT, was € 195,000.

On the 16<sup>th</sup> May 2022 LBV Ltd filed an appeal against the Zurrieq Local Council as the Contracting Authority objecting to their disqualification on the grounds that their offer was not financially compliant.

A deposit of € 400 was paid.

There were two (2) bids.

On the 16<sup>th</sup> June 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 – LBV Ltd**

Mr Justin Attard

Representative

#### **Contracting Authority – Zurrieq Local Council**

Dr Andre Borg  
Perit Diane Gauci  
Mr Joseph D'Amato  
Ms Josianne Cilia Mumford

Legal Representative  
Member Evaluation Committee  
Member Evaluation Committee  
Representative

### **Preferred Bidder – Big Projects**

Mr Francesco Portelli Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions, noting that two preliminary pleas had been raised by the Contracting Authority.

Dr Andre Borg Legal Representative for the Zurrieq Local Council stated that firstly the appeal letter was filed 13 days after the Council's decision and was thus '*four i termine*'. Secondly, the amount of only € 400 paid as deposit on this appeal was in breach of the PPRs and was not adequate for the value of the tender.

Mr Justin Attard Representative for LBV Ltd said that he was following exactly the information provided by the Council to which Dr Borg commented that the law was above any other factors or considerations.

After a short recess to consider these preliminary pleas the Chairman said that the Board had enough information to be able to decide on these preliminary pleas and will advise the parties accordingly. He then thanked the parties and declared the hearing concluded.

End of Minutes

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### **Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 16<sup>th</sup> June 2022.

Having noted the objection filed by Mr Justin Attard (hereinafter referred to as the Appellant) on 16<sup>th</sup> May 2022, refers to the claims made by the same Appellant with regard to the tender of XWM 67/01/22 listed as case No. 1745 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Mr Justin Attard

Appearing for the Contracting Authority: Dr Andre Borg

Whereby, the Appellant contends that:

- a) By means of a letter dated 3<sup>rd</sup> May 2022, the Zurrieq Local Council, as the Contracting Authority for the above tender, officially notified us of the evaluation conclusions. Our company was deemed as 'Financially not compliant' on the following grounds: *“A number of rates were not entered against various items in the Bill of Quantities/Financial Offer, therefore the financial offer is deemed incomplete and disqualified in accordance to 17.1 (e) of the General Rules Governing Tenders; Site Clearance Works - Item 1.01 was not included in Site Clearance Works total. Installation and Buried Infrastructure - Item 1.01, 1.02, 1.03, 2.01, 3.01, weren't submitted.”*
- b) Following verification of our tender submission, the above shortcomings were indeed confirmed, however we hereby refer to Article 17 - Correction of Arithmetical Errors of the General Rules Governing Tender.
- c) According to Article 17.1 (e) *“where there is an error in addition in the Grand Total, the evaluation committee will adjust with the correct amount.”* Furthermore, Article 17.3 of the said General Rules provides that *“The amount stated in the tender will be adjusted by the Evaluation Committee in the event of error, and the tenderer will be bound by that adjusted amount. In this regard, the Evaluation Committee shall communicate the revised price to the tenderer through a confirmation request via the ePPS. If the tenderer does not accept the adjustment within five (5) working days, his/ her tender will be rejected and his tender guarantee forfeited (if applicable).”*
- d) Therefore as per the above-mentioned articles the Contracting Authority was obliged to request a clarification or rectification regarding Item 1.1, and it was erroneous to outrightly deem our financial offer as incomplete due to an arithmetical error, without following the above procedure.
- e) Moreover, Clause 17.2 provides that *“Where no rate, price and total are entered against an item in the bill of quantities/financial offer, a confirmation request will be issued wherein the bidder is requested to confirm that the said item is included in the Grand Total and therefore the value of that item shall be calculated as being equivalent to '0', Such confirmation shall denote that the specific item is absorbed in the grand total and will remain zero-rated in case of potential modifications. Therefore - in the exceptional eventuality that a modification shall be required wherein the said item needs to be procured, such item shall be provided free of charge. Failure on the part of the bidder to accept that the item is valued at '0' and/ or submission of a fresh rate for that particular item would constitute a change in financial bid, thus rendering bid financially non-compliant.”*
- f) The above clause is self-explanatory, thus the Contracting Authority was again bound to request a clarification about Items 1.01, 1.02, 1.03, 2.01, 3.01, and was to decide whether our financial offer was incomplete only following the feedback received from our company.
- g) Furthermore, in the letter dated 3<sup>rd</sup> May 2022, we were informed that the "Name of Successful Tenderer" is 'Big Projects', A swift search on the MBR website does not show any companies registered by this name. There also doesn't seem to be any clear indication whether this is a legal entity in itself or indeed a legal arrangement of a number of natural and/or legal persons which are participating in this tendering procedure in unison, as regulated by Article 2 - Participation of the General Rules Governing Tender.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 26<sup>th</sup> May 2022 and its verbal submission during the virtual hearing held on 16<sup>th</sup> June 2022, in that:

- a) **Preliminaries – 1** - Primarily it shall be noted that from the wording of Article 271 of S.L. 601.03 the Objection has been filed *fuori termine*, as the article explicitly states that: *“The objection shall be filed within ten calendar days following the date on which the contracting authority or the authority responsible for the tendering process has by fax or other electronic means sent its proposed award decision or the rejection of a tender or the cancellation of the call for tenders after the lapse of the publication period.”* That the Letter of Objection of LBV Limited was dated 14<sup>th</sup> May 2022 and received by the Public Contracts Review Board on the 16 May 2022, which dates are both *fuori termine*, and beyond the ten (10) days imposed by law as the Zurrieq Local Council informed of the Awarded Tender by means of a notice dated the 3 May 2022.
- b) **Preliminaries – 2** - Secondly, it should be noted that Article 273 of the above mentioned S.L. also stipulates that: *“The objection shall only be valid if accompanied by a deposit equivalent to 0,50 per cent of the estimated value set by the contracting authority of the whole tender or if the tender is divided into lots according to the estimated value of the tender set by the contracting authority for each lot submitted by the tenderer, provided that in no case shall the deposit be less than four hundred euro (€400) or more than fifty thousand euro (€50,000) which may be refunded as the Public Contracts Review Board may decide in its decision.”* That LBV limited has only paid the minimum sum of four hundred euro (€400) and not the 0.50 per cent of the estimated value of the tender, which should have amounted to nine hundred and seventy five Euro (€975), based on the estimated value of the tender of €195,000. Therefore, the Board should not take cognisance of this Objection as it is also in breach of this provision, namely Article 273 of the Public Procurement Regulations.
- c) **Merits -** LBV Limited has quoted Article 17 but erroneously interpreted the meaning of "Correction of Arithmetical Errors" encapsulated in the mentioned article which states that: *“Admissible tenders will be checked for arithmetical errors by the Evaluation Committee”. “17.1 (c) where no rate or price has been entered, but a total has been provided, the rate is to be established by dividing the total against the quantity published; (d) where a rate or price has been entered, but no total has been inputted, the rate is to be multiplied by the quantity published to derive the total; (e) where there is an error in addition to the Grand Total, the evaluation committee will adjust with the correct amount.”*

Therefore, it must be noted that the Arithmetical Errors as defined in the mentioned General Rules Governing Requests for Quotations, was intended to mean primarily and include (although not exhaustive) the above mentioned reasons. Furthermore, in terms of Part 16,5 entitled Part 4: Financial Evaluation, “Clarification replies must be submitted within five (5) working days from notification, and will be free of charge: failure to comply shall result in the tender offer not being considered any further.”

Additionally, Part 16.5 entitled Part 4: Financial Evaluation indicates that *“The Evaluation Committee will check that the financial offers contain no arithmetical errors”*. Therefore, it is the obligation of the Evaluation Committee to ensure that the financial offers contain no arithmetical errors, and hence the Evaluation Committee was constrained to reject the tender in question in terms of Clause 18. In any case, it should be duly noted that the error conducted by LBV Limited was not an arithmetical one, but rather an offer which was in itself incomplete. The requested bids in sums of money were not provided and therefore LBV Limited was disqualified as it did not provide the requested information to participate and compete with the other bidders in terms of the Procurement Regulations. Further to the above, the tender itself stated clearly the following in Clause 3.1 *“This tender is not divided into lots, and tenders must be for the whole of quantities indicated. Tenders will not be accepted for incomplete quantities.”*

Therefore, the Council had no choice but to mark it as incomplete and disqualify the same from the process. Furthermore, the Bill of Quantity itself similarly enunciated: *“Tenderers must price each item in the bill of quantities separately and follow the instructions regarding the transfer of various totals to the Grand Summary.”* These explicit and thorough instructions were not adhered to by LBV Limited and should such lack of requisites been ignored, the Council would have been met with a number of Letters of Objections from the rest of the bidders who have in their majority, provided the Council with all the requested information, documentation and quantities, unlike LBV Limited. That neither has LBV Limited clarified nor rectified the incomplete documentation within five (5) working days imposed by the General Rules Governing Tenders.

- d) Finally, LBV Limited insinuated that Big Projects is not a registered company and therefore, it seems that according to the Objection, the same was not eligible to apply for the tender. This is largely unfounded and incorrect as it results clearly from the wording of the General Rules Governing Tenders that Economic Operators are likewise eligible to apply and that such Economic Operator need not be a company registered within the Malta Business Registry. Tenders in general are not opened only to registered companies, but rather an array of individuals, be it judicial or personal; partnerships or economic operators, Therefore, for the procurement of tenders purposes, even this claim is unfounded. It should be noted that in evaluating the information submitted by the tenderers, including the information, documentation and quantities submitted by 'Big Projects';, the Evaluation Committee ensured ab initio that the economic operator is eligible to qualify for a tender and that the same was consequently in possession of all the requirements stipulated in the procurement documents by the closing date for the submission of the same. It is therefore unfounded to state that 'Big Projects' has not provided information in terms of Clause 2 of the General Rules Governing Tenders.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will initially consider the Preliminary Pleas as raised by the Contracting Authority as follows:

a) **Preliminaries – 1 –**

- i. The Board will directly refer to regulation 271 of the Public Procurement Regulations (“PPR”) which states that *“The objection **shall** be filed within ten calendar days following the date on which the contracting authority or the authority responsible for the tendering process has by fax or other electronic means sent its proposed award decision or the rejection of a tender or the cancellation of the call for tenders after the lapse of the publication period.”* (bold emphasis added)
- ii. The date of the rejection letter sent to LBV Ltd is 3<sup>rd</sup> May 2022. Within it is stated that ‘deadline for filing (sic) a notice of objection (appeal) – till noon 17<sup>th</sup> May, 2022’.
- iii. This Board notes that ten calendar days, as required by regulation 271 of the PPR, would account to 13<sup>th</sup> May 2022 for an appeal to be filed.
- iv. Whilst it is a non-disputed fact that the Contracting Authority listed 17<sup>th</sup> May 2022, the appeal should have been filed by the 13<sup>th</sup> May 2022. Public procurement principles state that economic operators are well informed and normally diligent entities.
- v. Reference is also made to PCRB case 1557 whereby in a similar situation it was stated *“The Board deems appropriate to take this opportunity to solicit any contracting authority to refrain from indicating any dates by when a letter of objection is to be sent, but to solely indicate and/or reproduce the relative provision of the law which entitles a party to appeal.”*

This Board upholds the first preliminary plea of the Contracting Authority.

b) **Preliminaries – 2**

- i. Reference is made to Regulation 273 of the PPR whereby: *“The objection shall only be valid if accompanied by a deposit equivalent to 0.50 per cent of the estimated value set by the contracting authority of the whole tender.....”*
- ii. Reference is also made to the Rejection Letter dated 3<sup>rd</sup> May 2022 sent to the Appellant company whereby the Contracting Authority advised LBV Ltd that in order to file an appeal, a deposit of €400 has to be included / settled.
- iii. At this point, this Board opines that what the PPR require is self-explanatory, i.e. the 0.50 per cent should be calculated on the estimated value set by the contracting authority of the whole tender. The estimated procurement value is listed at €195,000, therefore a deposit of €975 was required.
- iv. The Board now refers to PCRB Case 1557 whereby it was stated *“The Contracting Authority did state in its letter informing bidders, that if they wish to appeal, a deposit of €400 was to be lodged. This Board, however, has on numerous occasions advised that Contracting Authorities should refrain from*

*making misleading statements but should strictly indicate what the law states, the appellant company should have always adhered with the provisions of the law, irrespective of such misleading statements".* The Board opines that this case / preliminary plea is similar in nature and the same argument is to be observed.

- v. Moreover, as stated in *Karta Converters Ltd vs Dipartiment tal-Kuntratti*, decided on 27th May 2015, it was stated *"Ma jistax illum is-socjeta appellant tissana dan l-izball fatali taghha ghaliex kien jispetta lilha li tottempra rubha mad-dettami tas-sejha bhala a reasonably well informed and normally diligent tenderer."*

### **The Board,**

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Upholds the Preliminary Pleas as submitted by the Contracting Authority,
- b) Directs that the objection lodged by the Appellant as not valid,
- c) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- d) Directs that the deposit paid by Appellant not to be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Mr Lawrence Ancilleri**  
Member

**Dr Charles Cassar**  
Member