

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1752 – SPD4/2021/052 – Works - Re-issue Tender for Finishing Works Using Environmentally Friendly Materials at St. Joseph Ward 1, Saint Vincent De Paul Long Term Care Facility**

**1<sup>st</sup> July 2022**

The Board,

Having noted the letter of objection filed by Dr Joanne Farrugia on behalf of Saga Juris Advocates acting for and on behalf of iprojects Ltd, (hereinafter referred to as the appellant) filed on the 30<sup>th</sup> May 2022;

Having also noted the letter of reply filed by Dr Noel Bezzina on behalf of Bezzina Legal acting for St Vincent de Paul Long Term Care Facility (hereinafter referred to as the Contracting Authority) filed on the 8<sup>th</sup> June 2022;

Having heard and evaluated the testimony of the witness Mr Anthony Caruana (Chairperson of the Evaluation Committee) as summoned by Dr Noel Bezzina acting for St Vincent de Paul Long Term Care Facility;

Having heard and evaluated the testimony of the witness Mr Sergio De Gabriele (Representative the Contracting Authority) as summoned by Dr Noel Bezzina acting for St Vincent de Paul Long Term Care Facility;

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 28<sup>th</sup> June 2022 hereunder-reproduced;

#### **Minutes**

#### **Case 1752 – SPD4/2021/052 – Re-issue Tender for Finishing Works using Environmentally Friendly Materials at St Joseph Ward 1, Saint Vincent De Paul Long Term Care Facility**

The tender was issued on the 29<sup>th</sup> September 2021 and the closing date was the 16<sup>th</sup> November 2021. The value of the tender, excluding VAT, was € 198,886.50.

On the 30<sup>th</sup> May 2022 iprojects Ltd filed an appeal against St Vincent de Paul Long Term Care Facility as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed to be technically not compliant. .

A deposit of € 994.43 was paid.

There were eleven (11) bids.

On the 28th June 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – iprojects Ltd**

Dr Joanne Farrugia	Legal Representative
Mr Mario Grixti	Representative

**Contracting Authority – St Vincent De Paul Long Term Care Facility**

Dr Noel Bezzina	Legal Representative
Mr Anthony Caruana	Chairperson Evaluation Committee
Ms Claudia Muscat	Representative
Mr Raymond Mangion	Representative
Mr Mark Micallef Costa	Representative
Ms Marica Saliba	Representative

**Preferred Bidder – Camray Company Ltd**

Dr Reuben Farrugia	Legal Representative
Mr Adrian Fabri	Representative

**Director 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 and invited submissions.

Dr Joanne Farrugia Legal Representative for iprojects Ltd said that Appellant's bid failed on one point i.e. the material of the grab rails. This was very clearly explained by Appellant when it provided details of the model number of this grab rail and as such made the exclusion disproportionate. The Tender Evaluation Committee (TEC) was obliged to give detailed consideration to all bids.

Dr Noel Bezzina Legal Representative for St Vincent De Paul Long Term Care Facility (SVP) said that Clause 10.3.1 of the tender specifically requests stainless steel grab rails. Appellant's bid does not mention the material of the rail and hence the TEC could not accept something that did not meet the requirements and therefore go beyond the terms of their adjudication. Appellant accepts that his offer did not meet the requirements and the TEC should not have to rely on carrying out searches to check if a product met the requirements.

Dr Reuben Farrugia Legal Representative for Camray Company Ltd said that according to a PCRB decision if any literature is provided in a foreign language it must be accompanied by a certified translation. In this case the specifications were supplied in the Spanish language, and if no translation was supplied they should be ignored. In point 3 and point 13 of the literature stainless steel material is indicated but not so in the case of the grab rail.

Mr Anthony Caruana (440782M) called as a witness by the Contracting Authority testified on oath that he was the Chairperson of the TEC and that the normal procedure had been followed in evaluating

the tender including seeking the advice of a technical person to verify the technical details. Any shortcomings were highlighted and checked over. In the case of the grab handles issue the TEC requested clarification – the same literature, in Spanish, as previously submitted was provided again.

Questioned by Dr Joanne Farrugia witness was referred to Doc 1 p1 submitted with the appeal letter and confirmed that there were some details in that document in English but the component part of the rail were identified just in Spanish – the TEC could not tell if part or the whole of the rail was made of stainless steel.

In reply to a question from Dr Reuben Farrugia witness confirmed that the boxed details of the component parts were in a foreign language and this had been confirmed by the technical person. There is no indication that the material was stainless steel.

Perit Sergio De Gabriele (0436592M) called as a witness by the Contracting Authority stated on oath that he was entrusted to compare the submissions with the tender. In this case the issue was that nowhere was stainless steel mentioned in connection with the grab rails.

In reply to questions from Dr Joanne Farrugia witness said that the literature covered items like flooring, tiling, sanitary ware and agreed that the grab rails was a small percentage of costs; however this was irrelevant as the grab rails were in common use and not restricted to cubicles. Grab rails in various materials were on the market.

This concluded the testimonies.

Dr Joanne Farrugia said that the literature submitted included the model number and this would have enabled confirmation of the material. The rails are components of bathroom sets bought as a whole. In the AIB Insurance case it was stated that proportionality should be considered to not eliminate a bid. In the Cassar Petroleum Case the lack of proportionality was censured, whilst in PCRB Case 1674 the principle of equality and proportionality was highlighted and should have been followed in this tender. The item offered conforms to the requirement but is simply not in the English language. The value of the grab rail in the relation to the full contract is proportionally insignificant.

Dr Reuben Farrugia stated that if this submission is accepted it will open the door to abuse and is a serious matter if, as stated, this shortcoming has been accepted in previous tenders. It is illogical to try to 'repair' shortcomings at a later stage of the process. Public procurement is there to satisfy all three stages of the evaluation – administrative, technical and financial. *Ex admissis* the technical specifications are neither in English or Maltese and therefore not conforming and that alone is enough to exclude. Also *ex admissis* it has not been explained if the grab rail is made of stainless steel and Appellant is simply suggesting the TEC should undertake a Google search of the model number – this suggestion ridicules the evaluation process. The cases quoted refer to requests for clarifications and that TECs would be remiss if they were not asked for or that one cannot have a situation of asking for clarifications of clarifications.

Dr Bezzina said that the suggested Google search would be tantamount to extending the submissions in the tender. There were two shortcomings – the materials and the language. In the Steelshape case it was held that the Appellant should provide information from start to finish and not expect the TEC to go searching for information.

There being no further submissions the Chairman declared the hearing closed.

## End of Minutes

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### Hereby resolves:

The Board refers to the minutes of the Board sitting of the 28<sup>th</sup> June 2022.

Having noted the objection filed by iprojects Ltd (hereinafter referred to as the Appellant) on 30<sup>th</sup> May 2022, refers to the claims made by the same Appellant with regards to the tender of reference SPD4/2021/052 listed as case No. 1752 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Joanne Farrugia

Appearing for the Contracting Authority: Dr Noel Bezzina

Appearing for the Preferred Bidder: Dr Reuben Farrugia

Whereby, the Appellant contends that:

- a) The decision of the contracting authority that “... *the material being offered for the drop-down grab rails was not specified*.....” is unfounded in fact and at law. On the twenty third (23<sup>rd</sup>) of March of the year two thousand and twenty-two (2022), the evaluation committee informed the bidder in the most generic way that the Company had to submit further information and documentation, including “... *missing literature as per literature list for items: 5, 7, 8, 9.*” In view of this, the Company submitted additional documentation relating to items 5, 7, 8 and 9. However, on the 16<sup>th</sup> of May 2022, the Company was informed that its bid was unsuccessful because the bidder failed to specify the material of the grab rails (grab rails as a whole constituted item 7). This was the first time that the Company was clearly informed that the requirement that it allegedly failed to fulfil was that relating to specifying the material of the grab rails.
- b) The Company respectfully brings to the attention of the Contracting Authority and the Public Contracts Review Board, that the Company submitted literature on item 7 to the Contracting Authority as it was asked to do. The submitted literature clearly displays the model number of the grab rails in question, i.e. model number 42968. DOC IP2 submitted with this appeal clearly shows what comes up with a general google search on the model number in question. DOC IP3 then shows what comes up when one clicks on the first link that shows when googling the said model

number. Such information clearly and unequivocally shows that this model of the grab rail is made out of stainless steel.

- c) That the Company was baffled that its tender offer was not accepted because the material of the grab rail was not specified, and this after submitting the specific model number for the grab rail in question, which model number not only provides the material of the grab rail, but plenty of other information. Appellant contends that tender dossiers contain so many requests for information that tenderers try to fulfil such requests in the most logical, time-effective and convenient ways, and providing the model number of different components is certainly one of the best ways to convey such information.
- d) That without prejudice to the above, the Company respectfully submits that the evaluation committee is made up of various members, including competent technical staff whose appointment on the evaluation committee is not only that of establishing which information is missing and which bid is the cheapest. Such two simple tasks may be carried out by any literate laymen. Technical members are appointed to an evaluation committee to go a step further, and not simply to read what any layman can read.
- e) One of the most fundamental functions of the evaluation committee is, in actual fact, to verify and evaluate information. The evaluation committee should confirm submissions made by tenderers and verify that what tenderers declare, is the truth; that their offer can work out; and that their offer is what the Contracting Authority wants. The evaluation committee had all the necessary information to check and verify that the model of the grab rail proposed by the Company is made of stainless steel. This information is widely available to anyone with the least technical qualifications, let alone to the competent and technical professionals that make up the evaluation committee.
- f) That the offer of the appellant was unjustly refused as the contracting authority had all the information and means required to verify that the grab rails were made of stainless steel. This exercise in itself would not have constituted a “clarification” or “rectification” but a simple confirmation which could have been made by anyone who is provided with the model number. This confirmation in itself does not change anything from the appellant's offer.
- g) Refusing to accept the tenderer's bid on the basis that the material of the grab rail was not specified even though the model number was clearly indicated and information on the model in question is widely and easily available, goes against public procurement regulations and the common good, which is that of securing the best offer for the least price.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 8<sup>th</sup> June 2022, its verbal submission during the virtual hearing held on 28<sup>th</sup> June 2022, in that:

- a) Section 10.3.1 of the tender document stipulates that: *".....Handles and grab rails for the special needs toilets are to be in stainless steel"*. As is clearly shown in the document, this was a specification which was clearly, specifically and explicitly requested in the tender document. However, despite it being listed as a specification in the document, the Appellant failed to specify the material of the drop-down handle being submitted in his offer. Needless to say, since the Appellant failed to specify the material, his offer was not compliant and therefore was not successful.
- b) The Contracting Authority respectfully, but strongly disagrees with the Appellant's argument that since the model number was submitted in his offer, the evaluation committee, composed of technical experts, had the information or should have obtained the requested information through a *"google search"* on the internet. Such reasoning has no basis at all, and only serves as an admission of the part of the Appellant that it failed to submit the requested information and specify the material being requested. This can also be shown in clause vii of the objection where the Appellant states that *".....the willingness to fulfil its bid in accordance with the technical specifications, even if any requirement or component was overseen by the Company"*
- c) The evaluation committee is tasked with examining and evaluating the offers being submitted against the tender requirements, and cannot or has no obligation to conduct further investigation which does not result from the submission itself.
- d) The lack of foundation of the Appellant's objection is further shown in the objection itself, where it stated that *"Appellant contends that tender dossiers contain so many requests for information that tenderers try to fulfil such requests in the most logical, time-effective and convenient ways, and providing the model number of different components is certainly one of the best ways to convey such information"* Once again, the Contracting Authority respectfully disagrees with this reasoning. Tender requirements and specifications are listed for a reason; they are requirements which must be provided by the tenderers in their submissions; failure of which leads to the disqualification of the tender submission in question. It is therefore up to each tender to submit the requested information which is clearly listed in the tender document.
- e) Therefore, notwithstanding the Appellant's reasoning, the evaluation committee was bound to evaluate (sic) the offer submitted and not go beyond that by conducting 'google searches'. It is also to be noted that, despite the fact that the Appellant was asked to clarify and submit further information, it still failed to specify the type of material of the model being offered.
- f) The Appellant also argues that, it is somehow common knowledge that the standard material in which grab rails are made is stainless. Once again, the Contracting Authority re-iterates that, the evaluation committee cannot rely on common knowledge or mere google searches in order to evaluate the offers submitted. If evaluation committees were to rely on such information, it would

vitiating the whole procurement process which is based on inter alia transparency and fair competition, and would go beyond the scope of public procurement.

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 now consider Appellant's grievances.

- a) The Board will initially make reference to a specific comment in the letter of objection, where it was stated *"This was the first time that the Company was clearly informed that the requirement that it allegedly failed to fulfil was that relating to specifying the material of the grab rail"*. This Board is in complete disagreement with such argumentation. Page 66 of the tender dossier is clear and unambiguous when it states in paragraph 10.3.1 *"Vitreous China sanitary ware colour shall be manufacturer's standard white and shall comply with BS EN 997:2003 or equivalent standards. Sanitaryware for people with special needs shall also comply with local regulations and the latest guidelines issued by the CRPD. Handles and grab rails for the special needs toilets are to be in **stainless steel**"* (bold emphasis added) Therefore, all economic operators were informed from the start as to the material of the grab rails.
- b) Since a rectification request was already sent to the appellant on 23<sup>rd</sup> March 2022, the evaluation committee could not send another clarification request as per "Notes to Clause 5" regulations on page 8 of the tender dossier where it is stated *"Requests for Clarifications and / or Rectifications concerning a previous request dealing with the same shortcoming shall not be entertained."*
- c) This Board is also in agreement with argumentation brought forward by the Preferred Bidder whereby Technical Literature is to be presented in the Maltese or in the English language. If not, other languages are accepted but only on the presentation of an accurate translation. (reference to the General Rules Governing Tenders paragraph 6.3). The relevant sections of the literature submitted for item '7' by the Appellant, is not in one of the official languages of the Republic of Malta and therefore is to be considered non-admissible for technical compliance.
- d) Finally, this Board will comment on its disagreement with the argumentation brought forward by the Appellant that the Evaluation Committee should be doing its own 'google searches' if it is just provided with the product codes during technical assessment. This would go against the principle of Self-Limitation as imposed on evaluation committees.

Therefore, this Board does not uphold Appellant's grievances.

**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**

**Ms Stephanie Scicluna Laiviera**  
**Member**