

PUBLIC CONTRACTS REVIEW BOARD

Case 1786 – IND-KIP-T006-22 - Works – Tender for Proposed Demolition and Dismantling (incl. Relocation to another site for Temporary Storage) existing Buildings, Nissen Huts and Hangars at KK3, Kirkop

19th September 2022

The Board,

Having noted the letter of objection filed by Dr Beryl Jean Buttigieg acting for and on behalf of Green Building Solutions Limited, (hereinafter referred to as the appellant) filed on the 12th August 2022;

Having also noted the letter of reply filed by Dr Elian Scicluna on behalf of 8 Point Law acting for and on behalf of INDIS Malta Ltd (hereinafter referred to as the Contracting Authority) filed on the 22nd August 2022;

Having also noted the letter of reply filed by Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Sammut Marine Limited (hereinafter referred to as the Preferred Bidder) filed on the 22nd August 2022;

Having heard and evaluated the testimony of the witness Mr Keith Buttigieg (Principal Procurement Officer at INDIS Malta Ltd) as summoned by Dr John Bonello acting for INDIS Malta Ltd;

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 15th September 2022 hereunder-reproduced.

Minutes

Case 1786 – IND-KIP-T006-22 – Tender for Proposed Demolition and Dismantling (incl. Relocation to another Site for Temporary Storage) Existing Buildings, Nissen Huts and Hangars at KK3, Kirkop

The tender was issued on the 8th April 2022 and the closing date was the 23rd May 2022. The estimated value of the tender, excluding VAT, was € 599,802.50.

On the 12th August 2022 Green Buildings Solutions Ltd filed an appeal against INDIS Malta Ltd as the Contracting Authority objecting to its disqualification on the grounds that its bid was not administratively and technically compliant.

A deposit of € 2,999 was paid.

There were five (5) bids.

On the 15th September 2022 the Public Contracts Review Board composed of Mr Kenneth Swain 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 – Green Buildings Solutions Ltd

Dr Beryl Buttigieg Legal Representative

Contracting Authority – INDIS Malta Ltd

Dr John Bonello	Legal Representative
Mr Anthony Caruana	Chairperson Evaluation Committee
Mr Gilmour Formosa	Secretary Evaluation Committee
Mr Dorian Bugeja	Member Evaluation Committee
Mr Ray Vella	Member Evaluation Committee
Mr Stephen Borg	Member Evaluation Committee
Mr Keith Buttigieg	Representative

Preferred Bidder – Sammut Marine Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Mr Benjamin Sammut	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Beryl Buttigieg Legal Representative for Green Buildings Solutions Ltd said that this was a clear case of hidden award criteria. Every mention in the method statement of items like demolition, labelling, numbering states that the list is non-exhaustive. This requirement of the tender was not even requested in the Gantt Chart but only asked for in Clarification Note 2. This made it difficult to understand why the Contracting Authority states that Clarification Note 2 was immaterial when Appellant made his submissions precisely on the basis of that Note. The Gantt Chart was accepted which makes it difficult to understand why further methodology was requested. The tender regularly made use of the word ‘contractor’ which can only refer to items after the contract has been awarded.

Dr John Bonello Legal Representative for INDIS Malta Ltd said that this case was very simple to decide and he requested witness to be heard.

Mr Keith Buttigieg (8879M) called as a witness by the Contracting Authority testified on oath that he is the Principal Procurement Officer at INDIS and explained the scope of the tender which included the dismantling, numbering, labelling of certain structures as a required by the Superintendent of Cultural Heritage (SCH) [document shown on a share screen]. This document from the SCH was published in the tender dossier to indicate the need for cultural preservation. Site visits of all buildings were arranged for all bidders and certain queries raised were dealt with through Clarification Note 2. As a result of these queries a number of buildings were omitted which reduced the scope of the tender. Clarification Note 1 changed the estimated value of the tender. The Clarification Notes were part of the tender and the contract agreement. Witness confirmed that the numbering and labelling of the structures were a crucial part of the tender.

In reply to question from Dr Buttigieg, witness stated that the tender dossier includes all documents published at tendering stage with the SCH document being marked as Appendix 'E'. The Gantt Chart covered four points in the Work Schedule.

This concluded the testimony of Mr Buttigieg.

Dr Buttigieg referred to the European Court cases emphasizing the requirement for transparency and equal treatment. She asked if the clarification covered both the scope of work and the technical specifications and how photographic evidence could be produced before the work was carried out? Transparency means clear instructions to all bidders so that documents are interpreted similarly by all parties.

Dr Clement Mifsud Bonnici Legal Representative for Sammut Marine Ltd stated that there appears to be some confusion in interpreting the tender terms. The cases quoted refer to BPQR tenders whereas this one is based on price. It is up to the bidder to ensure that all points are covered in the methodology. The argument that this was a case of hidden award criteria does not hold water and if one party failed on points of submission this should not reflect on other bidders. Page 63 of the tender document refers very clearly to the need for labelling and numbering.

Dr Bonello said that the use of the word 'contractor' in a tender is simply a reference to a bid made by a successful bidder. The General Conditions and Special Conditions refer to a contractor as by that stage all other bids have been discarded. The Method Statement refers to contractor throughout. Page 63 of the tender covers all aspects of the SCH requirements. The Clarification Note was none other than a supplement to the main tender and included full SCH requirements – the procedure therefore was fully transparent and an integral part of the tender. This was an abuse of the tender procedure.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 15th September 2022.

Having noted the objection filed by Green Building Solutions Limited (hereinafter referred to as the Appellant) on 12th August 2022, refers to the claims made by the same Appellant with regard to the tender of reference IND-KIP-T006-22 listed as case No. 1786 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Beryl Jean Buttigieg

Appearing for the Contracting Authority:

Dr John Bonello

Whereby, the Appellant contends that:

a) **Reason on which the appellant was disqualified are incorrect -**

The submittals required during the tendering stage in terms of "Section 3 Specifications" of the Tender Document were amongst other things the following- "2. *Method Statement. The Method statement shall include: a) Form - Method Statement. This form must be filled-in in relation to the works needed at the earmarked site; and b) Detailed report which elaborates further the salient points listed in the "Form Method Statement"*"

The tenderer was therefore required to submit the completed "Form Method Statement" and a detailed report elaborating further the salient points listed in the 'Form Method Statement'. In Clarification No. 2, the Contracting Authority provided to all prospective bidders (including the tenderer) additional information. Indeed, the clarification read "*Furthermore, the Contracting Authority is also providing the below information.*"

The above is clearly a reference to Clarification no. 2, in the sense that the tenderer is accepting to also provide the documentation and/or any detailed method statement as required in Clarification no. 2 at its own expense should he become the appointed "Contractor".

b) **Clarification No. 2 lacking clarity -**

Without prejudice to the above, Clarification No. 2 is in breach of Regulation 38(1) of L.N. 356 of 2016, which stipulates the following:-

"The procurement document shall be written in clear and unambiguous terms so as to enable all interested parties to understand properly the terms and conditions of the process."

The tenderer respectfully points out that, ironically, the clarification note created more ambiguity rather than clarity. Indeed, even if the Board were to consider that the tenderer had to submit additional information on the basis of Clarification No. 2 as part of its bid, rather than following award of the contract, the Contracting Authority did not state whether:-

- a. It required additional information from the tenderer at tender stage;
- b. The submittal of the additional information should have been done in the detailed report; and
- c. The additional information was either subject to Note 2 or 3, thereby indicating whether the issue could have been rectifiable or otherwise.

Indeed, whereas in its letter of regret the Contracting Authority states that "*The detailed report failed to provide information on the methodology to be adopted by the bidder.*", Clarification No. 2 merely stated that "*Furthermore, the Contracting Authority is also providing the below information...*"

Thus, the Contracting Authority somehow expected the tenderer to understand that it should firstly submit additional information, secondly that it should have submitted it in the detailed report and that finally should it fail to provide the said additional information the tenderer would automatically

be disqualified in terms of Note 3 rather than allowing clarification/rectification of any incorrect and/or incomplete documentation in terms of Note 2.

Furthermore, and also without prejudice to the above, the Contracting Authority could not have in the first place requested additional information by means of a clarification as this would have been in breach of Regulation 38(4) of L.N. 356 of 2016, which states the following:- *“The contracting authority or the central government authority may issue clarification notes to explain certain matters, to give additional information, to remove or amend certain inconsistencies or errors and to fill in missing information contained in the procurement document”*

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 22nd August 2022 and its verbal submission during the virtual hearing held on 15th September 2022, in that:

a) ***Rationale underlying disqualification of Objector's bid***

Section 3.0 of the tender document titled "Objectives and Description of Works Required" identifies that the works required consist in Part 1 - The demolition of the structures numbered 1 to 4, 7, 13, 25 to 27, 30, 31, 33 to 42 and 44 to 46 and Part II- The dismantling and relocation of the structures numbered 6, 8 to 12, 14 to 24, 28, 29, 32, 43 and 47 to 55. In respect of the latter, requested works include:-

“3.2: Part 2 (Dismantling Phase and relocation): Gutting out of existing services, partition walls and any type of finishes to internal areas and dismantling with care of existing buildings and numbered wherever is necessary (materials as stated in each item and building number as per masterplan provided with this tender, Appendix C), load into trucks and transport to another site as directed by Contracting Authority (site plan illustrated on Appendix D attached with this document), unload, and store in a manner to be reused in the future according to report by SCH (report provided with this tender). All dismantling, both for finishes and structure, is to be done under the guidance of the AIC and SCH.

....

3.5: Hoisting down and un/loading of materials during dismantling should be carried out adequately in order not to damage any of the materials to be re-used in the future as requested by SCH. All machinery and equipment to be used for hoisting/ transport, are to be certified accordingly.”

It is pertinent to note that Objector's method statement fails to identify the labelling/numbering, dismantling, relocation and storage manner of the structures. The same applies to Objector's detailed report.

Whilst Section 3 (Specifications) (page 28) of the tender document covering the scope of works does not make specific reference to the labelling, dismantling and relocation of the structures as being part of the scope of works, the scope of works and envisaged works are merely indicative as suggested by the wording itself unlike Section 3.0 (page 31 et seq) which is binding. Section 3 provides as follows:-

“Scope - The subject of this tender is for the demolition and dismantling (including their relocation to another site for temporary storage), of existing buildings, Nissen huts and Hangars, at KK3, Kirkop. The scope of the works shall also include the removal of all debris, all buildings on site and to close site with a new boundary wall. The time-limits for the execution of the contract shall be sixteen (16) weeks from the 'Commencement Notice' which shall be issued within two (2) weeks from signing of the contract.

The below is a non-exhaustive list of envisaged works:

- 1) Mobilization;*
- 2) Removal of miscellaneous items;*
- 3) Demolition works;*
- 4) Reinstatement and making good.”*

In view of the description of works provided in section 3.0 (page 31 et seq) and the provision of the SCH report, Objector's method statement and report was expected to cover labelling/numbering, dismantling, relocation and storage manner aspects. The issue of the Clarification which forms the basis of Objector's second grievance is immaterial in this context.

b) **Clarification No. 2 lacking clarity**

The description of works required in the tender document was formulated to meet the requirements of the Contracting Authority as imposed by the SCH in its report (Annex E). Objector contends that its interpretation of Clarification No. 2, led to the missing information on the methodology to be adopted by the bidder for the labelling, dismantling and relocation as they interpreted such clarification to envisage that such information had to be submitted post award and not at bidding stage. It is worth mentioning that all other bidders except Objector submitted the methodology for the labelling, dismantling and relocation as specified in Clarification No. 2. Had the clarification been ambiguous, other tenderer would have been expected to fail in this requirement. In any case, irrespective of Objector's claims, all SCH documentation has been made available to bidders and all requirements were known to all. Since all tenderers except for Objector submitted the requested method statement, the Contracting Authority was duty bound to apply the principle of equal and fair treatment between bidders and hence reject Objector's offer.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 22nd August 2022 and its verbal submission during the virtual hearing held on 15th September 2022, in that:

a) **First Ground of Objection**

On this ground of objection, the Recommended Bidder makes its own the Contracting Authority's submissions. The Tender, as issued originally, expected to provide methodology regarding labelling, dismantling and relocation and this is quite apart the additional information on the same provided in Clarification Note 2. The Recommended Bidder submits that the arguments raised by the Appellant are unfounded as follows:

- a. Firstly, the Appellant's argument that the additional information in Clarification Note 2 was to be ignored since it refers to "contractor" rather than "bidder" is very difficult to follow, in particular, when Section 3 - Specifications is littered with references to "contractor" when defining the "Scope of Works" (see page 31 et sequitur),
- b. Secondly, the reference made by the Appellant to Article 15 of the Special Conditions is irrelevant to the subject-matter of the appeal. The Appellant appears to be confusing TECHNICAL SPECIFICATIONS with PERFORMANCE CONDITIONS.

The additional information provided in Clarification Note 2 are essentially "technical specifications" which needed to be taken into account by the bidders in the compilation of their bid. Clarification Note 2 does provide for a "performance condition". The "performance conditions" are those in the Special Conditions and the General Conditions and as provided for in the Recital 104 of Directive 2014/24/EU:

Contract performance conditions are for laying down specific requirements relating to the performance of the contract. Unlike contract award criteria which are the basis for a comparative assessment of the quality of tenders, contract performance conditions constitute fixed objective requirements that have no impact on the assessment of tenders.

- c. Thirdly, the activities listed in Section 3 - Specifications and in the Method Statement Form are clearly and unambiguously indicated as "non-exhaustive" and as "examples", and therefore, these cannot be taken to be an exhaustive and complete list by a reasonable, diligent and prudent bidder.

b) **Second Ground of Objection**

On the second ground of objection, the Recommended Bidder, again, makes its own the Contracting Authority's submissions and further submits that;

Firstly, Clarification Note 2, which contains the aforementioned information, is an integral part of the Tender and it was made available to all bidders ahead of closing date for the submission of bids. Clarifications are part of the "Tender" and this is confirmed by the definition of the "procurement document" in the PPR and further provided for in the law:

"When issued in the clarification notes, the additional information and the supporting document shall form integral part of the procurement document."

Secondly, Clarification Note 2, as issued, is fully compatible with the law as it does just "give additional information" as permitted by Regulation 38(4) of the PPR-despite the Appellant's allegations to the contrary. In any case, and by submitting its bid, the Appellant has acquiesced to the issue of the Clarification Note 2 in full and it cannot raise any grievance on the contents of Clarification Note 2 at this stage and within the scope of Regulation 270 of the PPR.

Thirdly, and on the basis that the Clarification Note 2 is an integral part of the Tender and that it has been issued in conformity with the law, then it was the duty of all bidders, as reasonable, prudent and diligent bidders, to take into account that "additional information" and address it in their respective bids. From the documentation submitted by the Appellant, it appears that the Appellant simply failed to take into account this information--as if the Clarification Note 2 was never issued. This is a serious failure which is only attributable to the Appellant and which cannot be rectified at this stage. The Appellant is evidently trying to deflect responsibility on to the contracting authority for its oversight and default. The Appellant simply has not provided a coherent narrative to support its appeal and it is surprisingly expecting that the evaluation committee and this Honourable Board ignore Clarification Note 2-as if it was never issued-and somehow permit its technically non-compliant bid to be accepted.

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 witness duly summoned, will now consider Appellant's grievances.

- a) **Terms used - "Contractor" vs "Prospective Bidder"** – Initially this Board will delve into the argumentation as presented by Appellant whereby it is a non-contested fact that Clarification Note 2 uses the term "Contractor" and therefore, in essence, the reasoning of the Appellant is that any requirements emanating from such clarification note would only be 'required' post award of contract. This Board will outright declare that it does not agree with such a viewpoint. Page 31 of the tender dossier uses the term 'contractor' *ad nauseum* and therefore, this Board opines, is not a term which is used for the first time in the clarification note 2 that could have made such interpretation ambiguous. It is also this Board's opinion that clarification note 2 is very clear and that within it, the term "Contractor" is also to include prospective bidder when it states "*This method statement shall be subject to **prior** approval by the Contracting Authority.*" (bold & underline emphasis added) The 'method statement' is a document which was required by all prospective bidders at bidding stage.
- b) **Technical specifications vs Performance conditions** – without the need to repeat itself, this Board has already provided reasoning above that the term 'contractor' in clarification note 2 is also to be understood to include economic operators taking part in such tender procedure. Therefore, it goes without saying that any requirements in clarification note 2 are to be taken as technical specifications, i.e. to be part of economic operators bid for eventual technical compliance assessment. Moreover, it is imperative to point out that clarification note 2 also included the term "*.... a clarification note which is construed to form an integral part of the tender document.*" Therefore, any requirements set by it need to be complied with in order for a bid to be technically compliant.

- c) ***Reason for disqualification & clarity of clarification note 2*** – it has already been ascertained in the 2 points above that any requirements of clarification note 2 needed to be addressed at bidding stage and that in this Board’s viewpoint there is no ambiguity in such requirements. Therefore, this Board opines that the Rejection Letter and the main reason provided for disqualification is duly proportionate with what is expected out of a proper and dutifully exercised evaluation procedure. Any mis-interpretation or lack of understanding by the Appellant that such requirements were to be satisfied post award, could have been answered if a clarification request was put forward to the Contracting Authority. It is an accepted concept in public procurement that economic operators are expected to be prudent and diligent in the way they structure their respective bid.

Hence, this Board does not uphold the 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

Mr Lawrence Ancilleri
Member

Dr Charles Cassar
Member