

PUBLIC CONTRACTS REVIEW BOARD

Case 1883 – SPD2/2022/042 – Supplies - Tender for the Supply, Delivery, Installation and Commissioning of Two (2) Passenger Lifts in Divisions XI, XII and XIII at the Corradino Correctional Facility – Correctional Services Agency

12th June 2023

The Board,

Having noted the letter of objection filed Dr Joseph Calleja Parnis on behalf Calleja Legal acting for and on behalf of Eletech Limited, (hereinafter referred to as the appellant) filed on the 28th April 2023;

Having also noted the letter of reply filed by Dr Mario Mifsud acting for the Correctional Services Agency (hereinafter referred to as the Contracting Authority) filed on the 8th May 2023;

Having heard and evaluated the testimony of the witness Mr Chris Camilleri (Representative of Eletech Limited) as summoned by Dr Joseph Calleja Parnis acting for Eletech Limited;

Having heard and evaluated the testimony of the witness Mr Jonathan Sevasta (Representative of Bank of Valletta) as summoned by Dr Joseph Calleja Parnis acting for Eletech Limited;

Having heard and evaluated the testimony of the witness Mr Alan Falzon (Secretary of the Evaluation Committee) as summoned by Dr Joseph Calleja Parnis acting for Eletech Limited;

Having heard and evaluated the testimony of the witness Mr John Degiorgio (Representative of the Sectoral Procurement Directorate) as summoned by Dr Mark Anthony Debono acting for the Department of Contracts;

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 8th June 2023 hereunder-reproduced.

Minutes

Case 1883 – SPD2/2022/042 – Supplies – Tender for the Supply, Delivery, Installation and Commissioning of Two (2) Passenger Lifts in Division XI, XII and XIII at the Corradino Correctional Facility – Correctional Services Agency

The tender was issued on the 8th July 2022 and the closing date was the 11th August 2022. The estimated value of the tender, excluding VAT, was € 92,000.

On the 28th April 2023 Eletech Ltd filed an appeal against the Correctional Services Agency as the Contracting Authority objecting that the award of the tender was withdrawn and the tender cancelled.

A deposit of € 400 was paid.

There were three (3) bids.

On the 8th June 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri 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 – Eletech Ltd

Dr Joseph Calleja Parnis	Legal Representative
Mr Christopher Camilleri	Representative

Contracting Authority – Correctional Services Agency

Dr Mario Mifsud	Legal Representative
Ms Alexandra Pirotta Muscat	Chairperson Evaluation Committee
Mr Alan Falzon	Secretary Evaluation Committee
Mr Dylan Grima	Evaluator
Insp Philip Zammit	Evaluator
Insp Ronald Bugeja	Evaluator

Department 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 Joseph Calleja Parnis Legal Representative for Eletech Ltd said that after the tender had been awarded, the performance guarantee originally provided been corrected and the contract signed the tender was cancelled. The reason given was that the performance guarantee was not in the preferred bidder's name but in the name of a third person (Mrs Rita Camilleri). This reason was not valid at law.

Dr Mario Mifsud Legal Representative for the Correctional Services Agency said that the guarantee was not submitted in the statutory time frame but was much delayed, the amount was incorrect and it was in the name of a third person. These shortcomings did not give the Authority the assurance it required about the level of service it would get. A guarantee in the name of a third person creates doubts and uncertainties. The conditions of the tender were very clear but the remedies of the Appellant in regularising matters were all very late. The decision to withdraw the award was justified.

Mr Chris Camilleri (029295M) called to testify by the Appellant stated on oath that he is a Director of Eletech Ltd and that in the past it was awarded a number of Government projects. Witness accepts that there were delays in signing the contract and producing the guarantee which was correctly submitted on the 1st March 2023. The guarantee was issued in the name of Rita Camilleri as witness did not want to reduce the bank balance of the Company. Witness was subsequently advised that the tender was cancelled.

In reply to a question from Dr Mifsud witness stated that he had been tendering for Government work for over four years. Referring to a trail of e-mails (Doc 1) witness confirmed that he had informed the Authority that the guarantee was going to be issued on Eletech Ltd.

Mr Jonathan Sevasta (112577M) called as a witness by the Appellant stated on oath that he was a Representative of the Bank of Valletta which issued the guarantee. He exhibited copy of the bank performance guarantee (Doc 2) issued for the amount of € 1,900 in the name of Rita Camilleri. At a later date the amount of the guarantee was increased. Witness explained that once the guarantee was issued the guarantor had no further involvement. The Bank simply took the money if the guarantee was called in.

In reply to a question from Dr Mifsud witness said that the Bank follows the exact instructions given to it by its client and had done so in this case regarding the value amount of the guarantee.

Mr Alan Falzon (195175M) called as a witness by the Appellant stated on oath that he was the Secretary of the Evaluation Committee and that he worked for the Correctional Services Agency. Witness stated that Eletech had been given several chances to sign the contract and provide the guarantee – from November to the final deadline of the 22nd February. The guarantee provided on the 24th February was for an incorrect amount and was not in the name of the contractor. Guidance was sought on this point and the Authority was advised that this is incorrect. The decision was taken to cancel the award because of the many delays and the incorrect bank guarantee which bore no reference to Eletech Ltd. The Sectoral Procurement Directorate had given guidance that the guarantee has to be in the name of the Eletech Ltd.

Mr John Degiorgio (115969M) called to testify by the Director of Contracts stated on oath that he was a Director at the Sectoral Procurement Directorate which regulates the general conditions covering tenders and lays down the parameters of the guarantees. He could not recall the exact regulation covering this but was certain that the guarantee had to be presented within two weeks of the award although some flexibility was allowed.

In reply to questions witness confirmed that Appellant had been given an extension to produce the guarantee to the 3rd March; that the guarantee was in the name of a third person not connected to the tender and that the guarantee had to be in the name of the contractor.

This concluded the testimonies.

Dr Calleja Parnis said that the Board can only focus on the cancellation notice which states that the issue was on the performance guarantee. The Authority set a submission date of 3rd March and this was fulfilled as has been confirmed. Nowhere does the tender state that the guarantee must be in the name of the contractor – the point is that if the guarantee is called in the Bank would honour it immaterial of the name on it. The Authority has not been prejudiced by having a different name. The cancellation of the tender is invalid and should be revoked.

Dr Mifsud said that terms and dates in this case seem to have been ignored. The error in the value amount of the guarantee was not made by the Bank but by the Appellant as witness has testified. Bidder ignored all the courtesies and allowances extended to him by the Authority. Once the tender is re-issued it will avoid all the uncertainties that arose in this case.

Dr Debono said that the Contracting Authority has to follow Regulation 20 of the General Rules Governing Tenders and produce the guarantee in the form provided, otherwise it would be difficult to link the contractor with the performance guarantee.

There being no further submissions 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 8th June 2023.

Having noted the objection filed by Eletech Limited (hereinafter referred to as the Appellant) on 28th April 2023, refers to the claims made by the same Appellant with regard to the tender of reference SPD 2/2022/042 listed as case No. 1883 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Joseph Calleja Parnis

Appearing for the Contracting Authority: Dr Mario Mifsud

Whereby, the Appellant contends that:

a) General comments -

That following such award the Contract was then signed by the parties and the appellant proceeded to submit the required documents including the Performance Guarantee in the requested amount and this was done within the stipulated timeframe.

Consequently, by means of a letter dated the 18th April 2023 issued by the Department of Contracts, the Appellant was informed that the above-mentioned award notice issued on the 21st October 2022 of the tender in question was being withdrawn based on the allegation that the recommended Economic Operator, hence the Appellant had failed to submit the required documentation by the indicated deadline, quoting Clause 20.5 of the General Rules Governing Tenders.

b) First grievance -

That the first grievance of the Appellant is that the allegation that he failed to submit the required documentation by the indicated deadline is manifestly unfounded. The Appellant is outright rejecting the allegation that he failed to submit the required documents by the indicated deadline. That the Appellant asserts and confirms that all the documents that were requested from him were duly provided and submitted to the Department of Contracts in due time including the Performance Guarantee and this as it will be shown during the hearing of this case. Hence there

are absolutely no grounds upon which to invoke Clause 20.5 of the General Rules Governing Tenders.

c) Second grievance -

That without prejudice to the above, the second grievance of the Appellant concerns the fact that it is true that initially the Appellant mistakenly submitted the Performance Guarantee in the wrong amount, however such genuine mistake was immediately rectified and the Performance Guarantee was then submitted in the correct amount within the indicated deadline.

d) Third grievance -

That without prejudice to the above, the third grievance of the Appellant concerns the fact that it is completely irrelevant and immaterial who the person indicated on the Bank Guarantee as being the issuing person is, as this does not affect its efficacy in terms of redemption. That this is being stated in view of the fact that what is of relevance on a Bank Guarantee is the person in favour of whom such Guarantee would be issued. In the case at hand the Bank Guarantee was properly issued in favour of the Correctional Services Agency as requested. Hence, at all times and upon a simple written demand, the Correctional Services Agency could still have proceed (sic) to request the Bank to honour the payment indicated on the Bank Guarantee, immaterial of the person indicated on the guarantee as being the issuing person. The validity of a bank guarantee is independent of the person indicated as issuing it. So much so. that the Bank honours the payment on the Bank Guarantee by a simple request made by the person in whose favour it is issued, in this case the Correctional Services Agency. Therefore, it is amply clear and evident that the position of the Correctional Services Agency was never jeopardised and it was at all times covered by a validly issued Performance Guarantee in its favour which it could redeem by a simple written request.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 8th May 2023 and its verbal submission during the hearing held on 8th June 2023, in that:

- a) The appellant failed to provide necessary documentation, bank guarantee, within the stipulated official deadlines.
- b) Moreover, the bank guarantee was submitted on different dates from those requested.
- c) The bank guarantee has been issued by a third-party who has nothing to do with the tender in question and is of a different amount to that requested.
- d) These issues were rectified but not within the stipulated timeframes provided.

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 in their entirety.

- a) Even though the appellant was provided with a number of extensions to submit the performance guarantee, he was in very clear terms instructed that the performance guarantee should be issued on the awardee, i.e. Eletech Ltd. Nonetheless, the performance guarantee provided / submitted was issued on the name of Ms Rita Camilleri
- b) Reference is now made to the General Rules Governing Tenders article 20.8 whereby it is duly stated that *"The performance guarantee referred to in the General Conditions is set at..... and **must be presented in the form provided through www.etenders.gov.mt**. The performance guarantee shall be released in accordance with the provisions of the General/Special Conditions of Contracts."* (bold & underline emphasis added)
- c) Reference is now made to the 'Specimen Tender Guarantee Form' whereby it is stated that
*"Whereas the Director of Contracts, Department of Contracts, Notre Dame Ravelin, Floriana, FRN 1600, has invited tenders, and whereas Messrs **[Name of tenderer]** (hereinafter referred to as the Tenderer) **is submitting such a tender in accordance with such invitation**, we [Name of Bank], hereby guarantee to pay you on your first demand in writing a maximum sum of Euro (€.....) in case the Tenderer withdraws his tender before the expiry date or in the case the Tenderer fails to provide the Performance Guarantee, if called upon to do so in accordance with the Conditions of Contract....."* (bold & underline emphasis added)
- d) Reference is finally made to the bank guarantee which states *"in connection with the contract..... entered into between Correctional Services Agency and Rita Camilleri (referred to as the Contractor), whereby the Contractor undertook the Supply Delivery & Installation....."* The Board opines that such a statement is factually incorrect as Ms Rita Camilleri is not the contractor who participated in this tender process.
- e) The Board opines that the General Rules Governing Tenders and the Specimen Tender Guarantee Form very explicitly require that the Performance Guarantee is to be issued in the name of the awardee directly! The appellant was also duly informed of this in the email of Monday 27th February 2023 whereby he was informed that *"The PG is to be issued on the awardee – Eletech Ltd."*

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 to cancel the tender as per General Rules Governing Tenders article 20.5,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Ms Stephanie Scicluna Laiviera
Member