

PUBLIC CONTRACTS REVIEW BOARD

Case 1919 – SPD6/2023/020 – Supplies - Tender for Supply and Installation of Electric Vehicle Chargers for MPWP

9th October 2023

The Board,

Having noted the letter of objection filed Mr Edward Grech acting for and on behalf of Raymond Vella & Co Ltd, (hereinafter referred to as the appellant) filed on the 11th September 2023;

Having also noted the letter of reply filed by Ing Conrad Casha acting for Public Works Department (hereinafter referred to as the Contracting Authority) filed on the 20th September 2023;

Having heard and evaluated the testimony of the witness Ing Conrad Casha (Chairperson of the Evaluation Committee) as summoned by Dr Steve Decesare acting for Raymond Vella & Co 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 5th October 2023 hereunder-reproduced.

Minutes

Case 1919 – SPD6/2023/020 – Supplies – Tender for the Supply and Installation of Electric Vehicle Chargers for MPWP (Ministry for Public Works and Planning)

The tender was issued on the 19th May 2023 and the closing date was the 27th June 2023. The estimated value of this tender, excluding VAT, was € 447,913.

On the 11th September 2023 Raymond Vella & Co Ltd filed an appeal against the Ministry for Public Works and Planning (MPWP) as the Contracting Authority objecting to their disqualification on the grounds that their offer was not technically compliant and the subsequent cancellation of the tender.

A deposit of € 2,240 was paid.

There were three bids on this tender.

On the 5th October 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Raymond Vella & Co Ltd

Dr Steve Decesare
Mr Edward Grech

Legal Representative
Representative

Contracting Authority – Ministry for Public Works and Planning

Dr Mark Sammut	Legal Representative
Eng Conrad Casha	Chairperson Evaluation Committee
Ms Catherine Azzopardi	Secretary Evaluation Committee
Eng Joseph Abela	Evaluator
Eng Melchior Grech Galdes	Evaluator
Peri Mark Vella	Evaluator
Eng Mario Sammut	Representative

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 Steve Decesare Legal Representative for Raymond Vella & Co Ltd requested that witnesses be heard first.

Engineer Conrad Casha (195767M) called to testify by the Appellant stated on oath that he was the Chairperson of the Tender Evaluation Committee (TEC). He was referred to Section 5 (C)(i) of the tender and he confirmed that this covered two parts – the technical offer questionnaire and the technical literature. The Appellant’s reply to the clarification conformed with the tender requirements and a ‘yes’ reply was provided in the questionnaire. Witness, when referred to the letter of the 1st September 2023 from the Contracting Authority, indicating the points where the Appellant did not conform with specification and advising cancellation of the tender stated that certain clauses (2.3, 2.10 and 3.12) were not corroborated by technical literature. The TEC was not comfortable that its requests had been met. There were no issues with the technical offer but with the technical literature. Despite being given a chance to rectify its position the Appellant failed.

In reply to questions from Dr Mark Sammut, Legal Representative for MPWP, witness confirmed that certain items requested in the clarification were not corroborated by literature. Items like software were confirmed but other points like security of equipment were either not corroborated or were not clear.

In reply to further questions from Dr Decesare, witness stated that clarification was sought to cover shortcomings where the information was not clear. The TEC had to follow the tender specifications. Witness confirmed that no request was made to rectify the missing literature even though this was allowed under Note 2.

This concluded the testimony.

Dr Decesare said that this appeal hinged on the rectification and the reply to it. The number of items on which rectification was sought were all confirmed but the Appellant was penalised because the TEC expected documents which it did not ask for. Appellant is not expected to go beyond the requested rectification which was fully and correctly completed as confirmed by witness. Public Procurement Regulation 38 deals with the principles of clear terms and conditions, this apart from the principles of transparency, equality and proportionality. The Contracting Authority must be clear in what it requires and in this case if more documents were required Note 2 obliged the Authority to

request them. Request for further documents was the option rather than exclusion. CJEU Case 426/19 dictates that the least onerous decision must be taken if in doubt.

Dr Sammut said that the appeal was based on Section 5 (C). Confirmation on the points in the rectification had been submitted but not the literature to substantiate those points. The TEC position is that this was not done by Appellant.

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 5th October 2023.

Having noted the objection filed by Raymond Vella & Co Ltd (hereinafter referred to as the Appellant) on 11th September 2023, refers to the claims made by the same Appellant with regard to the tender of reference SPD6/2023/ 020 listed as case No. 1919 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Steve Decesare

Appearing for the Contracting Authority: Dr Mark Sammut

Whereby, the Appellant contends that:

- a) The technical offer submitted by bidders is dependent on the information requested by the Contracting Authority in Section 5(C) of the Instructions to Tenderers, the Tenderer's Technical Offer form and the tender response format. The Appellant provided all the requested information in the submitted offer.
- b) On 11 July 2023, the Contracting Authority sent a Request for Rectification to the Appellant, in which the Appellant was asked to confirm a series of specifications that were given in Section 3 (Specifications) of the tender document. The Appellant sent its reply to the Request for Rectification on 17 July 2023.
- c) The Request for Rectification requested confirmations beyond what the tender document (Section 5(C)) or the Tenderer's Technical Offer originally requested. The specification confirmations requested in the Request for Rectification normally form part of the Technical Questionnaire in the Tenderer's Technical Offer and in case the Contracting Authority requires literature to back such specifications at tender stage, the Contracting Authority also requests that the bidder submits

the model number or catalogue number and the literature of the item being offered. However, such requests need to be made in the original tender document and the Contracting Authority cannot make additional requests during the course of the evaluation.

- d) The Request for Rectification, was not a clarification or rectification on information that was originally requested by the Contracting Authority to form part of the technical offer but was an extract of the specifications given in Section 3 of the tender document which the Appellant was asked to confirm. The Appellant questions whether such a Request for Rectification is in line with evaluation procedures and whether the Contracting Authority made requests that go beyond normal adjudication practice. In particular, the Appellant is raising this point as bidders were requested at tender stage to submit a declaration through the tender response format confirming that they would abide by the Tender Specifications (Section 3 of the Tender Document). The Appellant in fact confirmed its compliance with the Tender Specifications by submitting its confirmation in the tender response format. Therefore, the confirmations requested by the Contracting Authority in the Request for Rectification were already submitted by the Appellant through this declaration at tender stage.
- e) Notwithstanding the points raised above, the Appellant responded in time to the Request for Rectification and in a correct manner. In fact, the Request for Rectification only asked for the confirmation of certain specifications and did not request that such confirmations are corroborated by submitting additional technical literature. The Appellant confirmed all the items (System Requirements, Other Requirements, Management Software and Mobile App) in the reply to the Request for Rectification.
- f) The letter sent to the Appellant informing him that the offer was technically non-compliant listed all the requests made in the Request for Rectification with the addition of another request - 6. Warranty Obligations - which was not included in the Request for Rectification. It seems from this letter that the offer was deemed as technically non-compliant due to items in Specification Clauses 2.3 (tamper-proof), 2.10 (touchscreen) and 3.12 (5GHz frequency band), as the Appellant failed to corroborate such items with technical literature.
- g) The Appellant does not agree with the decision of the Contracting Authority that the offer was technically non-compliant as the Appellant was only requested to confirm the items listed in the Request for Rectification and the Appellant provided the necessary confirmations in its reply, despite that the Appellant questions whether such a Request for Rectification was justified during the course of the evaluation process given the points already raised above.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 20th September 2023 and its verbal submission during the hearing held on 5th October 2023, in that:

- a) The Contracting Authority has deemed the bid in question as technically non-compliant since the appellant did not fully corroborate the Technical Offer with the technical literature. As the technical literature submitted by the appellant had various specifications which were not clear or missing, the Contracting Authority sent a rectification letter on the 11th July 2023 for the appellant to confirm such issues.
- b) Although the appellant simply confirmed the required items with an affirmative reply, he still failed to submit the technical literature supporting his confirmed items and thus he was in breach of Section 5(C) (ii) in providing a complete literature to corroborate a fully compliant technical offer as per rule 16.3 of the General Rules Governing Tenders. The appellant was clearly (sic) aware of this requirement as Section 5(C) (ii) was quoted in his reasoned letter of objection.
- c) The Contracting Authority further contends that the appellant's statement in the reasoned letter of objection at paragraph 2.3 is not correct. If the appellant had provided all the requested information in the submitted offer, the Contracting Authority would not have had the need to send a rectification letter. As for paragraph 2.5, the Contracting Authority never requested any information that went beyond the tender document requirements. The scope of the rectification was to confirm the corroboration of the technical literature with the technical questionnaire submitted by appellant.
- d) The Contracting Authority sent the rectification to give a further opportunity to the appellant to clarify and rectify the missing information in the technical literature and thus the Contracting Authority is also rebutting the argument made by the appellant in paragraph 2.6. The Contracting Authority was always in line with the evaluation rules since the rectification was in line with the conditions pertaining to the rule of an item classified as note 2.
- e) Thus the Contracting Authority re-iterates that its decision was correct since the appellant, although replying to the rectification letter, still failed to present sufficient technical literature to have a fully corroborated and compliant technical offer. Such is confirmed by the appellant as in his submissions he is asking for the continuation of the technical evaluation of his bid and to make any additional clarifications or rectifications if necessary.

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) Reference is made to regulation 38(1) of the Public Procurement Regulations ("PPR") which states that *"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**"* (bold & underline emphasis added). Without a shadow of a doubt, this regulation is also applicable to requests for rectifications which are issued by the Evaluation Committees on behalf of the Contracting Authorities during the process of their evaluation.
- b) Therefore, when one considers the subject matter and merits of this particular appeal, this Board opines that the main bone of contention revolves around on whether the rectification request, as issued by the Evaluation Committee, meets this requirement or not.
- c) When the rectification request was duly analysed, it transpires that what was requested by the Evaluation Committee from the economic operator, now appellant, were 'confirmations'. Nowhere was the appellant requested to substantiate his replies, or a section of them, with technical literature. This was also confirmed by the witness, Ing Conrad Casha, who under oath stated that *"no request was made to rectify the missing literature even though this was allowed under Note 2."*
- d) Therefore, this Board cannot understand the reason why the Evaluation Committee deemed the appellant as technically non-compliant when the rejection letter stated *"Bidder replied but failed to corroborate rectification for items in Specifications Clauses 2.3 (tamper-proof), 2.10 (touchscreen) and 3.12 (5Ghz frequency band) with technical literature. Thus, this bid was considered to be technically non-compliant."* Nowhere in the rectification request was the appellant made aware that he had failed to file all the required technical literature.
- e) If the appellant failed to submit technical literature to corroborate certain specifications within its initial submission, then they should have been duly provided with an opportunity to rectify such a situation with the issuance of a request for rectification which specifically and unambiguously requests the submission of the missing technical literature for corroborative analysis. This since the issue at hand, i.e. missing technical literature, falls duly under the remit of Note 2 which states that *"Tenderers will be requested to either clarify/ **rectify** any incorrect and/or incomplete documentation, and/or **submit any missing documents** within five (5) working days from notification."* (bold & underline emphasis added)

Hence, this Board upholds the Appellant's grievances.

The Board,

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

- a) To uphold the Appellant's concerns and grievances;
- b) To revoke the 'Cancellation Notice' dated 1st September 2023;
- c) To cancel the Letter of Rejection dated 1st September 2023 sent to Raymond Vella & Co Ltd;
- d) To order the contracting authority to re-evaluate the bid received from Raymond Vella & Co Ltd in the tender whilst also taking into consideration this Board's findings, more specifically through the issuance of a rectification request as per paragraph (e) of the Board's findings;
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Dr Vincent Micallef
Member

Dr Charles Cassar
Member