

PUBLIC CONTRACTS REVIEW BOARD

Case 1926 – SPD6/2023/007 – Works - Tender in Lots for the Refurbishment Works at Gnien Dar Il-Kaptan, Mtarfa using environmentally friendly materials – Re-issue – Lot 1

23rd October 2023

The Board,

Having noted the letter of objection filed Dr Stephen Thake on behalf of Thake Desira Advocates acting for and on behalf of Mr George Vella, (hereinafter referred to as the appellant) filed on the 31st August 2023;

Having also noted the letter of reply filed by Mr Joseph Borg Grech acting for Public Works Department (hereinafter referred to as the Contracting Authority) filed on the 11th September 2023;

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 19th October 2023 hereunder-reproduced.

Minutes

Case 1926 – SPD6/2023/007 – Works – Tender in lots for the Refurbishment Works at Gnien Dar il-Kaptan, Mtarfa using Environmentally Friendly Materials – Re-Issue.

LOT 1

The tender was issued on the 24th April 2023 and the closing date was the 14th June 2023. The estimated value of this tender, excluding VAT, for Lot 1 was € 331,733.92.

On the 31st August 2023 Mr George Vella filed an appeal against the Public Works Department, Ministry for Public Works and Planning as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed to be not technically compliant.

A deposit of € 1,659 was paid on this lot.

There were nine bids on Lot 1.

On the 19th October 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Mr George Vella

Dr Stephen Thake

Legal Representative

Ms Marika Bonello

Representative

Contracting Authority – Ministry for Public Works and Planning

Dr Mark Sammut

Legal Representative

Perit Joseph Borg Grech

Chairperson Evaluation Committee

Eng Samuel Farrugia

Evaluator

Perit Antoine Sapiano

Evaluator

Eng Conrad Casha

Evaluator

Perit Rupert Pace

Representative

Preferred Bidder – LBA Ltd.

Invited to attend but declined the offer.

Department of Contracts

Dr Mark Anthony Debono

Legal Representative

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

Dr Stephen Thake Legal Representative for Mr George Vella said that Appellant relied on the written submissions but would emphasise that the Board gives consideration to the definition of the words used in the tender and their exact meaning.

Dr Mark Sammut Legal Representative for the Contracting Authority said that the Authority also relied on the written reply. From the Technical Specifications it was clear to understand what 5- meant and that it referred to a quantity. The Appellant offered 4 and since this was a Note 3 item it could not be rectified.

Dr Thake concluded by saying that this was a matter of semantics and 5- does not mean five in number.

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 19th October 2023.

Having noted the objection filed by Mr George Vella (hereinafter referred to as the Appellant) on 31st August 2023, refers to the claims made by the same Appellant with regard to the tender of reference SPD6/2023/007 listed as case No. 1926 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Stephen Thake

Appearing for the Contracting Authority: Dr Mark Sammut

Whereby, the Appellant contends that:

- a) The alleged non-compliance of offer made by the said George Vella arises from the number of burners (4) of the model being offered in his offer. This statement was based on the incorrect premises that the tender required that the model have five (5) such burners. The cited requirement arises from Section B Clause 11.2.1 of the Tender document which states "5-Cast Iron porcelain coated burners" (sic). The underlined words are semantically unintelligible and could never be the basis of the exclusion of the offer made by the said George Vella. There is nothing to suggest that '5' in the hyphenated '5-Cast' was intended to indicate 5 as the amount of burners required, because the hyphen modifies the adjective after it which in turn qualifies the noun (in fact, it should have been 'porcelain-coated', the noun being burners). Thus, the phrase '5-Cast' is meaningless and the number 5 cannot conceivably be attributed the meaning of a qualification of the number of burners the model offered should have. This more so when the tender document has used a word and number format in respect of numerical requirements set out in the specifications in Section 1 of the same Tender document.
- b) Even were one to consider that the requirement that there be five (5) burners to have actually existed in the tender document, the decision to exclude the offer and accept an offer which was €22,202 or 7.5% higher based on an item having a value of €450 in the offer made by the said George Vella is unjust and unjustifiable, particularly when no effort was made by way of clarification or rectification to address the perceived non-compliance and in effect save the sum of €22,202 for the public purse.
- c) Regulation 239(7) of SL. 603.041 states that, "*The contracting authority shall specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone*". Paragraph 6 (Criteria for Award) of Section 1 of the tender document states that the sole award criterion will be the price and that the tender would be awarded to the cheapest priced offer satisfying administrative and technical criteria. Based on this criterion, the tender should thus have been awarded to the said George Vella and could only not be so awarded only if it was concluded by the Contracting Authority that the (alleged and disputed) non-compliance meant that the offer as a whole did not satisfy technical criteria. The topic implicit in this consideration has been the subject matter of European judgements interpreting Directive 2014/24/EU, from which, as stated, our law was transposed. The combined effect of the judgements is that held that a contracting authority may not, in principle, apply weighting rules which it has not previously brought to the tenderer" attention. As

is clear, the contracting authority had not in this case clarified that one burner less than five was by the Contracting Authority at any stage(sic).

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 11th September 2023 and its verbal submission during the hearing held on 19th October 2023, in that:

- a) The Contracting Authority has deemed the bid in question as technically non-compliant since the model offered by the appellant consisted in 4 burners and not 5 as requested in the tender documents. The model required had to be equipped with '5-Cast Iron porcelain coated burners'. This statement clearly means that the requirement is for 5 in number, cast iron porcelain coated burners. The Contracting Authority cannot comprehend the appellant's argumentation that the phrase 5-cast is meaningless. Notwithstanding the alleged (sic) issue of interpretation, the appellant had the opportunity to ask for a clarification on this issue. Since this was not done, the ordinary remedies available to him at that time were not exhausted.
- b) The appellant submitted in his bid a BBQ 'Beef Eater - Built-In BBQ 1500 Series 4 Burner.' The model given was a 4 Burner BBQ and clearly not a 5 burner as requested. The technical questionnaire is Note 3 and thus the Contracting Authority could not send a clarification on the subject matter. As a matter of fact, on a separate issue the Contracting Authority had sent a clarification to rectify the matter. Unfortunately this was not the case with the Note 3 technical questionnaire.
- c) As stated in the appellant's objection *Paragraph 6 (Criteria for Award) of Section I of the tender document states that the sole award criterion will be the price and that the tender would be awarded to the cheapest priced offer satisfying administrative and technical criteria.* ' The Contracting Authority is in full agreement with this statement and thus reiterates that the appellant was not awarded the tender since it did not satisfy the technical criteria. With reference to the foregoing reasons the Contracting Authority humbly requests the board to confirm the TEC's board decision dated 22nd August 2023.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will now consider Appellant's grievances.

- a) It is this Board's opinion that what the tender required was a five (5) burner BBQ set. This was clear and unambiguous.
- b) As stated on numerous occasions, in order for a bid to make it to the financial evaluation part of the process, it must duly 'pass' and satisfy the tests of the administrative and technical requirements.
- c) Since the appellant's Technical Offer Questionnaire, which falls under the remit of Note 3, did not meet the requirements imposed on it, as per tender requirements, this offer is to be duly deemed as technically non-compliant.

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 in relation to Lot 1:

- 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