

PUBLIC CONTRACTS REVIEW BOARD

Case 1935 – SPD1/2023/036 – Works - Tender for the General Maintenance to Façade and Roofs of Block D, F and J with Painting Works which maximise the lifespan of the paint whilst minimising associated environmental impacts at MCAST– Lot 3 – General Maintenance of Façade Block J

7th November 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 14th September 2023;

Having also noted the letter of reply filed by Dr Jean Carl Abela on behalf of FSGM Partners Advocates acting for MCAST (hereinafter referred to as the Contracting Authority) filed on the 22nd 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 31st October 2023 hereunder-reproduced.

Minutes

Case 1935 – SPD1/2023/036 – Works – Tender for the General Maintenance to Façade and Roofs of Block D,F, & J with Painting Works which maximise the lifespan of the paint whilst minimising associated environmental impacts at MCAST

LOT 3

The tender was issued on the 27th April 2023 and the closing date was the 5th June 2023. The estimated value of Lot 3 of this tender, excluding VAT, was € 56,616

On the 14th September 2023 Mr George Vella filed an appeal against the Malta College of Arts, Science and Technology as the Contracting Authority objecting to his disqualification on the grounds that his bid was deemed to be technically not compliant.

A deposit of € 400 was paid.

There were three bids on this lot.

On the 31st 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
Ms Marika Bonello

Legal Representative
Representative

Contracting Authority – Malta College of Arts, Science and Technology

Dr Jean Carl Abela
Mr Jesmond Zammit

Legal Representative
Representative

Recommended Bidder – KDF Ltd

Invited to attend but declined the invitation

Department of Contracts

Mr Nicholas Aquilina

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 relies on the letter of appeal as the basis for his claim that nowhere in the tender document is there any request clearly set out to provide the brand and model that the Contracting Authority is now requesting and the Board is requested to scrutinise carefully the tender document.

Dr Jean Carl Abela Legal Representative for the Malta College of Arts, Science and Technology stated that likewise the reasoned letter of reply makes the case for the Contracting Authority which required the name of the product offered whilst linking it to the technical literature. This was omitted and being a mandatory requirement left the Authority with no alternative except to disqualify the bid. This decision is correct.

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 31st October 2023.

Having noted the objection filed by Mr George Vella (hereinafter referred to as the Appellant) on 14th September 2023, refers to the claims made by the same Appellant with regard to the tender of reference SPD1/2023/036 – Lot 3 listed as case No. 1935 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Stephen Thake

Appearing for the Contracting Authority: Dr Jean Carl Abela

Whereby, the Appellant contends that:

- a) The alleged non-compliance of offer made by the said George Vella does not exist. The imperative that the tenderer should "write down in the Technical Offer the brand and model" of the items required for completion of the works is nowhere clearly set out in the tender document and appears to be a "requirement" hastily contrived to justify the exclusion of the cheaper offer made by the said George Vella.
- b) Regulation 239(7) of SL 603.04 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*". 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 tenderers' attention. As is clear, the contracting authority had not in this case clarified that the tenderer should "write down in the Technical Offer the brand and model" of the items required for completion of the works.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 22nd September 2023 and its verbal submission during the hearing held on 31st October 2023, in that:

- a) By way of introduction, one of the requirements each tenderer had to input and reference in the Technical offer form, is the name of the product which was going to be utilised for the project, whilst making reference to the technical literature submitted with the offer, as evident in the last column of the technical form.
- b) The appellant left various rows/columns of the above mentioned requirement without an answer and therefore failing to indicate which product he was going to use. The appellant's technical offer form which was submitted is self-explanatory whereby the appellant did not specify what stabilising solution he was proposing to use, which stabilising solution had to meet the specifications in the tender.

- c) The above shortcoming is a technical fault by the appellant which therefore rendered the appellant technically non-compliant since as explained above, the appellant had failed to input in the technical offer form, the brand name of the paint/product he would be using during the execution of the works, which information is vital for this tender. The same shortcomings in the technical form is also repeated in item reference 2.04 and 3.01. As established in the proviso of Article 5(c)(i) of Section 1 of the tender document: *"all technical criteria listed in the technical offer form are of a mandatory nature and thus failure to complete even a single item will disqualify the submitted offer"*
- d) Bearing the technical offer form falls under NOTE 3, whereby no rectification shall be allowed to the form, the evaluation committee had to decide on the form as submitted by the appellant, which consequently is incomplete which ultimately renders the appellant non-compliant.
- e) Although the award criteria is based on the cheapest offer, the tenderer must firstly be technically compliant, whereby the requested information and documentation is submitted correctly as requested, as clearly defined in Article 6 of Section 1 of the tender document. Therefore, the appellant's argument that he should be awarded the tender since his offer was the cheapest, without being compliant, is incorrect and inadmissible in this regard. Therefore, the decision taken to disqualify and declare the tenderer non-compliant is correct.

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) ***Regulation 239(7) of the Public Procurement Regulations -***

Initially this Board points out that the regulation made reference to by the appellant, i.e. regulation 239(7) of the Public Procurement Regulations, is irrelevant to proceedings since this applies when the award criteria would be in accordance with the Best Price Quality Ratio (BPQR). When considering that in this particular tender, the Criteria For Award was specifically the *".... cheapest priced offer satisfying the administrative and technical criteria"*, the section *".... except where this is identified on the basis of price alone."* of the regulation would apply. Therefore the Contracting Authority was not obliged to provide the relative weightings to each criteria chosen to determine the most economically advantageous tender.

b) ***Technical non-compliance -***

Reference is now made to the Technical Offer Form which falls under the remit of Note 3. Within such form, the last column was entitled *"Reference in the Technical Literature where this is being stated/ shown (if applicable)"*. When analysing the Technical Offer Form as submitted by the appellant it is evident that 'relevant' sections, as listed in the letter of rejection of 4th September 2023, were left completely blank. No information whatsoever was provided by the appellant.

The Technical Offer Form duly states that *"The technical offer falls under Note 3, thus, the information / technical specifications provided in the below table shall not be subject to rectifications. Therefore, bidders **that fail***

to complete in full, submit and upload the requested information will be deemed as non-compliant and will result in disqualification of their offer.” (bold emphasis added).

Hence, this Board does not uphold the Appellant’s grievances and cannot but confirm the Contracting Authority’s decision.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides in relation to Lot 3:

- 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